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OBSERVATIONS

ON THE

RIGHTS AND DUTY

OF

JURIES,

IN

TRIALS FOR LIBELS:

TOGETHER WITH

REMARKS ON THE ORIGIN AND NATURE

OF THE

LAW OF LIBELS.

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PREFACE.

THE Writer of the following Obſervations not being a lawyer by profeſſion, ſome apology may ſeem neceſſary, for his attempting to write upon a ſubject, which may be thought more peculiarly the province of the profeſſors of the law. But it is a ſubject, as he conceives, of great importance to the general intereſts of liberty, a ſubject in which every Engliſhman is concerned, and in which ſome of the gentlemen of the long robe, from the habits of their profeſſion, and from their connexions

nexions and future proſpects, are perhaps, not perfectly impartial. It is, however, a ſubject, which ſhould be generally underſtood by men of all ranks, and eſpecially by thoſe who are liable to ſerve on juries; for the liberty of the preſs is eſſentially connected with it, and with that liberty every other branch of public freedom.

As the writer of theſe Obſervations has read moſt of the pieces that have been publiſhed relative to the law of libels, and peruſed almoſt every trial of this kind that has been publiſhed, he is not unacquainted with the language of the law upon that ſubject, and could have expreſſed himſelf with a greater conformity to the technical

technical phraſes of that profeſſion. But as he writes not for lawyers, but chiefly for men of other profeſſions and employments, he thought it beſt to make uſe of language that ſhould be generally intelligible. Every man, who is liable to ſerve on a jury ſhould endeavour, as far as his other avocations will admit, to make himſelf acquainted with the duties of that important office: and it is not poſſible for this knowledge to be too generally diſſeminated.

In any incidental expreſſions that may be uſed, in the courſe of theſe Obſervations, relative to the gentlemen of the law, the Writer hopes it will not be imagined, that he meant

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any thing diſreſpectful to the members of that profeſſion in general. For many of them he has a great perſonal eſteem and regard. He conſiders it as a very honourable profeſſion; and he has a high ſenſe of the worth of many of thoſe who are engaged in it. He has not forgotten, that if the profeſſion of the law has been diſgraced by a JEFFERIES and a SCROGGS, it has alſo been adorned by a HALE, a SELDEN, a SOMERS, and a CAMDEN.

OBSER-

OBSERVATIONS, &c.

AMONG the ſeveral great and diſtinguiſhed privileges, of which the inhabitants of this country are poſſeſſed, none is more important to their perſonal ſecurity, than the right of trial by jury. But this right has, in particular inſtances, been rendered leſs beneficial to the ſubject than it might have been, by the ignorance or timidity of thoſe who have ſerved on juries; and by the arts which have been employed to confine them within narrower limits than was intended by the conſtitution, and to bewilder their under-

ſtandings by the ſubtilties of legal ſophiſtry. It is, therefore, of great conſequence to the intereſts of public freedom, that the rights of jurymen ſhould be reſolutely maintained, and their buſineſs and duty clearly explained and generally underſtood. In the obſervations now offered to the public, the rights and duty of juries in trials for libels is the particular object of attention; as it is apprehended, that doctrines have been recently advanced upon that ſubject, by men whoſe offices naturally give weight to their opinions, which are highly derogatory to the rights of juries, inconſiſtent wtih the purpoſes for which juries were evidently appointed, and totally ſubverſive of the freedom of the preſs.

By the doctrine which has lately been maintained upon this ſubject, juries have no buſineſs, or right, in trials for libels, to enter at all into the merits of any book, pamphlet, or paper, which any man is tried for

for writing, printing, or publiſhing, but merely to inquire into the fact of publication, and into the innuendoes, or application of the blanks, if there be any; and if the publication be proved, they are to find the defendant guilty, leaving the innocence, or criminality, of the book or paper ſtyled a libel, wholly to the determination of the court. Whether ſuch book or paper be in law a libel, is, we are told, a queſtion of law upon the face of the record; and to the determination of this the jury are not competent.

THIS doctrine, though not very ancient, is certainly not new. It was maintained, in the laſt century, by ſome of thoſe judges, and crown lawyers, who were enemies to the rights of juries, and to the freedom of the preſs; and their example has been copied ſince, and much legal dexterity exerted, in order to prevail on juries to ſubmit to this diminution of their power and

importance. The doctrine, however, has been repeatedly and ſtrongly oppoſed, by theſe who were friends to a free preſs, and to general liberty. It was, indeed, manifeſt to every man, who thought coolly and impartially upon the ſubject, and who could diveſt the doctrine of the technical obſcurity, in which it appeared to be intentionally involved, that it would render juries uſeleſs in caſes, in which, of all others, their interference was the moſt neceſſary to the ſecurity of the ſubject; and that it could not juſtly be conſidered in any other light, than as an extenſion of the power of the judges, to the prejudice of the moſt ſacred and important rights of Engliſh juries.

NEITHER by the ancient common law of the land, or by any ſtatute, have juries ever been deprived of the power of bringing in a general verdict, in trials for libels, any more than in any other caſes. All that

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is called law upon the ſubject is only the opinion of certain judges, occaſionally delivered, and manifeſtly calculated to extend their own juriſdiction. But no uſurpation on the rights of juries ought to be ſubmitted to, and particularly in criminal proſecutions for libels, as in theſe caſes the influence of the crown is eſpecially to be apprehended. In the ordinary caſes that come before the judges, as they have no intereſt on either ſide, it is natural for them to deliver their opinions, in general, with impartiality. But, in trials for libels, it has been no uncommon thing to ſee in the judge, before whom the cauſe was tried, a manifeſt deſire to convict the defendant; a deſire that has been apparent to every man in the court. It is in ſuch caſes as theſe, therefore, that Engliſh juries ſhould exert their right of judging for themſelves; and in which they ſhould reſolutely refuſe to bring in a verdict of guilty, againſt thoſe whom they are appointed to try, unleſs

leſs they have a full conviction that they have been guilty of ſome criminal act. It was in order to give the ſubject this ſecurity, that juries were appointed; and if they do not exert the power, which the conſtitution has given them in ſuch caſes, they violate the truſt repoſed in them, and are themſelves unworthy of the protection afforded by the laws of a free country.

THAT judges, appointed by the king, may have an improper bias on their minds, in cauſes between the crown and the ſubject, is a very ancient, and certainly a very rational idea. It has, therefore, ever been thought a great advantage, that, in ſuch caſes, the ſubject ſhould be protected from any undue influence in the mind of a judge, by the interpoſition of a jury. But the ſubject would be wholly deprived of this protection, in trials for libels, if juries were only to inquire into the fact of publication,

which

which is ſeldom doubtful, or difficult to prove, and entirely to leave the merits of the publication to the determination of the court. It may alſo be obſerved, that it would be the more improper to inveſt the judges with the excluſive power of determining the criminality of libels, becauſe they are at preſent inveſted with a power of diſcretionary puniſhment. This is, perhaps, too much; but ſurely, in a free country, the ſame men ought not to be inveſted with the ſole power of determining what may, or may not, be innocently written or publiſhed, and alſo with a power of diſcretionary puniſhment.

JURIES, in all criminal proſecutions, have an undoubted right to try the whole matter in iſſue before them; and nothing can be more abſurd, than to ſuppoſe that juries, in trials for libels, are to find a fellow-citizen guilty of a crime, though they have no conviction of his having done any thing

thing criminal; for if they find nothing but the mere facts of writing, printing, or publiſhing, they find nothing that neceſſarily involves in it the leaſt degree of criminality. It is obſerved by an ingenious and able writer upon this ſubject, that 'a criminal 'proſecution and trial can only be had for 'a crime; now the mere ſimple publica-'tion of any thing not libellous (there be-'ing no public licenſer) is no crime at all; 'it is then the publication of what is falſe, 'ſcandalous, and ſeditious, that is the crime, 'and ſolely gives juriſdiction to the criminal 'court; and that therefore is what muſt, 'of neceſſity, be ſubmitted to the jury for 'their opinion and determination. A de-'ciſive argument to the ſame purpoſe may 'be drawn from the conduct of the law-'yers themſelves in this very matter. For 'it is agreed, on all hands, to be neceſſary, 'for the crown-pleader to ſet forth ſpecially 'ſome paſſages of the paper, and to charge 'it to be a falſe or malicious libel. Now,

'this

'this would never be done by the law-
'pleaders, ſubmitted to by the attorney-
'general, or endured by the judges, if it
'was not eſſential to the legality of the
'proceeding. The King's Bench, in grant-
'ing the information, only act like a grand
'jury in finding a bill of indictment, and
'in effect ſay no more than this, That, ſo
'far as appears to them, the paper charged
'ſeems to be a libel, and therefore the per-
'ſon accuſed ſhould be put upon his trial
'before a jury, whoſe buſineſs it will be to
'enter thoroughly into the matter, hear
'the evidence examined, and what the
'counſel can ſay on both ſides, and form a
'judgment upon the whole, which, after
'ſuch a diſcuſſion, it will not be difficult
'for any man of common underſtanding to
'do. Whether the contents of the paper
'be true, or falſe, or malicious, is a fact
'to be collected from circumſtances, as
'much as whether a treſpaſs be wilful or
'not, or the killing of a man with malice

'fore-

'forethought. "Whether any act was "done, or word ſpoken, in ſuch or ſuch a "manner, or with ſuch or ſuch an intent, "the jurors are judges. The court is not "judge of theſe matters which are evidence, "to prove or diſprove the thing in iſſue." 'This is our law, both in civil and criminal 'trials, although the latter are by far the 'moſt material, becauſe what affects our 'perſon, liberty, or life, is of more conſe-'quence than what merely affects our pro-'perty[1].' The ſame writer alſo ſays, 'In 'all criminal matters, where law is blended 'with fact, juries, after receiving the in-'ſtruction of the judge, muſt determine 'the whole, by finding the defendant ge-'nerally guilty or not guilty[2].'

SERJEANT Salkeld ſays, 'In all caſes, and 'in all actions, the jury may give a general,

[1] Letter concerning libels, warrants, the ſeizure of papers, &c. p. 10, 11. 4th edit.

[2] Another letter to Mr. Almond in matter of libel, p. 58.

'or

'or ſpecial verdict, as well in cauſes cri-
'minal as civil, and the court ought to re-
'ceive it, if pertinent to the point in iſſue,
'for if the jury doubt they may refer
'themſelves to the court, but are not bound
'ſo to do[3].' And it is obſerved by Sir Matthew Hale, that 'If the judges *opinion* 'muſt rule the matter of fact, the trial by 'jury would be uſeleſs;' and that 'it is the 'conſcience of the *jury* that muſt pronounce 'the priſoner *guilty* or *not guilty*[4].' But juries can be no check whatever upon judges, in trials for libels, if they are confined to the mere fact of publication. If this be admitted, the conſequence is, that any man who has written any book, pamphlet, or paper, containing any animadverſions or remarks on public men, or public meaſures, or on any other ſubject,

[3] Salkeld's Reports, vol. III. p. 373.

[4] Hiſtoria Placitorum Coronæ, vol. II. p. 313.

may

may be condemned, and puniſhed at diſcretion, by judges appointed by the crown. The moſt venal partizan of courtly power will hardly have the confidence to pretend, that this is compatible with a ſtate of national freedom.

Sir John Hawles ſays, 'Tis moſt true, 'juries are judges of matters of fact: that 'is their province, their chief buſineſs; but 'yet not excluding the conſideration of 'matter of law, as it ariſes out of, or is 'complicated with, and influences the fact. 'For to ſay, they are not at all to meddle 'with, or have reſpect to, law in giving 'their verdicts, is not only a falſe poſition, 'and contradicted by every day's experi-'ence; but alſo a very dangerous and per-'nicious one tending to defeat the prin-'cipal end of the inſtitution of juries, and 'ſo ſubtilly to undermine that which was 'too ſtrong to be battered down.'

'Though

'THOUGH the direction, as to matter of 'law ſeparately, may belong to the judge, 'and the finding the matter of fact does, 'peculiarly, belong to the jury; yet muſt 'the jury alſo apply matter of fact and law 'together; and from their conſideration of, 'and a right judgment upon both, bring 'forth their verdict: For do we not ſee in 'moſt general iſſues, as upon not guilty— 'pleaded in treſpaſs, breach of the peace, 'or felony, though it be matter in law 'whether the party be a treſpaſſer, a breaker 'of the peace, or a felon; yet the jury do 'not find the fact of the caſe by itſelf, 'leaving the law to the court; but find the 'party guilty, or not guilty, generally? So 'as, though they anſwer not to the queſtion '*ſingly*, what is law? yet they determine 'the law, in all matters, where *iſſue is* '*joined*. So likewiſe is it not every day's 'practice, that when perſons are indicted 'for murder, the jury not only find them 'guilty, or not guilty; but many times,

'upon hearing, and weighing of circum-
'ſtances, bring them, either guilty of mur-
'der, *manſlaughter*, *per infortunium*, or *ſe*
'*defendendo*, as they ſee cauſe? Now do
'they not, herein, complicatively reſolve
'both law and fact? And to what end is
'it, that when any perſon is proſecuted
'upon any ſtatute, the ſtatute itſelf is
'uſually read to the jurors, but only that
'they may judge, whether, or no, the
'matter be within that ſtatute?

'As juries have ever been veſted with
'ſuch power by law, ſo, to exclude them
'from, or diſſeize them of the ſame, were
'utterly to defeat the end of their inſtitu-
'tion. For then, if a perſon ſhould be in-
'dicted for doing any common innocent
'act, if it be but clothed and diſguiſed, in
'the indictment, with the name of trea-
'ſon, or ſome other high crime, and
'proved, by witneſſes, to have been done
'by him; the jury, though ſatisfied in con-
'ſcience,

'ſcience, that it is not any ſuch offence as 'it is called, yet becauſe (according to this 'fond opinion) they have no power to 'judge of law, and the fact charged is 'fully proved, they ſhall, at this rate, be 'bound to find him guilty [5].'

LITTLETON ſays, 'In ſuch caſe where 'the inqueſt may give their verdict at large, 'if they will take upon them the know-'ledge of the law upon the matter, they 'may give their verdict generally as is put 'in their charge.' To this Coke adds, 'Although the jury, if they will take upon 'them (as Littleton here ſaith) the know-'ledge of the law, may give a general 'verdict; yet it is dangerous for them ſo 'to do, for if they do miſtake the law, 'they run into the danger of an at-'taint; therefore to find the ſpecial matter 'is the ſafeſt way, where the caſe is doubt-

[5] Engliſhman's Right, p. 14, 15, 16, 17. edit. 1771.

'ful.'

'ful'.' This caution appears to refer to very abſtruſe points of law, and is not juſtly applicable to the caſe of libels. But the right of the jury to determine the *law*, as well as the *fact*, even in the moſt difficult caſes, is not here diſputed.

LORD-CHIEF-JUSTICE Vaughan, obſerves, that 'upon all general iſſues, as 'upon not *culpable*, pleaded in treſpaſs, *nil* 'debet in debt, *nul tort*, *nul diſſeiſin* in 'aſſize, *ne diſturba pas* in *quare impedit*, 'and the like; though it be matter of law, 'whether the defendant be a treſpaſſer, a 'debtor, diſſeizer, or diſturber in the par-'ticular caſes in iſſue; yet the jury find 'not (as in a ſpecial verdict) the fact of 'every caſe by itſelf, leaving the law to 'the court, but find for the plaintiff or 'defendant upon the iſſue to be tried, 'wherein they reſolve both law and fact 'complicately, and not the fact by it-

[5] Inſtitutes, Part I. Lib. III. §. 368.

'ſelf;

'ſelf; ſo as though they anſwer not ſingly to 'the queſtion what is the law, yet they 'determine the law in all matters, where 'iſſue is joined, and tried in the prin-'cipal caſe, but where the verdict is ſpe-'cial[7].'

Sir Matthew Hale ſays, 'The jury 'may find a ſpecial verdict, or may find 'the defendant guilty of part, and not 'guilty of the reſt, or may find the de-'fendant guilty of the fact, but vary in 'the manner. If a man be indicted of 'burglary, *quòd felonicè et burglariter* '*cepit et aſportavit*, the jury may find 'him guilty of the ſingle felony, and 'aquit him of the burglary and the *burg-*'*lariter*. So if a man be indicted of 'robbery with putting the party in fear, 'the jury may find him guilty of the fe-'lony, but not guily of the robbery. The

[7] Vaughan's Reports, p. 150.

'like where the indictment is *clam et ſecrete a perſonâ*[8].'

In an indictment for murder, 'ſuppoſe 'the priſoner killed the party, but yet in 'ſuch a way as makes no felony, as if he 'were of *non ſane* memory, or if a man 'kills a thief, that comes to rob him, or to 'commit a burglary, or if an officer in 'his own defence kills one, that aſſaults 'him in the execution of his office, which 'are neither felony nor forfeiture, whether 'it is neceſſary to find the ſpecial matter, 'or may the party be found *not guilty?* I 'think, and ſo I have known it conſtantly 'practiſed, the party in theſe caſes may be 'found *not guilty*, and the jury need not 'find the ſpecial matter[9].'

Hale alſo ſays, 'What if a jury give a 'verdict againſt all reaſon, convicting or

[8] Hiſtoria Placitorum Coronæ, vol. II. p. 301, 302.

[9] Ibid, p. 303.

'acquitting

'acquitting a perſon indicted againſt evi-
'dence, what ſhall be done? I ſay, if the
'jury will convict a man againſt or with-
'out evidence, and againſt the direction or
'opinion of the court, the court hath this
'ſalve to reprieve the perſon convict be-
'fore judgment, and to acquaint the king,
'and certify for his pardon. And as to an
'acquittal of a perſon againſt full evidence,
'it is likewiſe certain the court may ſend
'them back again, and ſo in the former
'caſe, to conſider better of it before they
'record the verdict; but if they are per-
'emptory in it, and ſtand to their verdict,
'the court muſt take their verdict and re-
'cord it, but may reſpite judgment upon
'the acquittal [10].'

INDEED, the right of the jury to deter-
mine the law, as well as the fact, or to
bring in a general verdict, appears to be

[10] Hiſtoria Placitorum Coronæ, Vol. II. p. 309, 310.

clearly aſcertained by expreſs ſtatute. In the ſtatute of the 13th of King Edw. I. Weſtm. cap. 30. it is ſaid: 'All juſtices of 'the benches from henceforth ſhall have in 'their circuits clerks to enrol all pleas plead-'ed before them, like as they have uſed to 'have in time paſſed. And alſo it is or-'dained, that the juſtices aſſigned to take 'aſſizes ſhall not compel the jurors to ſay 'preciſely whether it be diſſeizin, or not, ſo 'that they do ſhew the truth of the deed, 'and require aid of the juſtices. But if 'they of their own head will ſay, that it is 'diſſeizin, their verdict ſhall be admitted 'at their own peril.' It appears from the marginal notes to the Statutes, Cay's edition, that this clauſe is conſidered as declaratory of the right of juries to bring in a general verdict, and this even in matters of property, in which the law, in many caſes, may be conſidered as more intricate and obſcure than in criminal caſes. The word *Diſſeizin* ſignifies "an unlawful diſpoſſeſſ-

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" ing a man of his land, tenement, or " other immoveable, or incorporeal right." When, therefore, a jury took upon themſelves to ſay, " It is diſſeizin," they determined a point of law, as well as a queſtion of fact. It is declared by this ſtatute that they have a right to do this, and that they are not to be compelled to bring in a ſpecial verdict.

In trials for murder, it is a point of law whether the act, by which the perſon was killed, be murder, or manſlaughter, or chance-medley, or ſelf-defence; but this point of law, as well as the truth of the fact itſelf, is almoſt always finally determined by the jury. In ſuch caſes, the judge explains to the jury the ſeveral kinds of homicide, and may give them his opinion under what denomination the particular act comes which is the ſubject of their inquiry. But they are not obliged to adopt his opinion;

nion: they have an undoubted right to bring in a general verdict. In ſome caſes, an act of homicide may be attended with ſuch circumſtances, that it may be a very nice and difficult point of law to determine, whether it was murder, or whether it was manſlaughter. But even in ſuch caſes, the final determination is left by law to the jury; for ſpecial verdicts in trials for murder are extremely uncommon, and depend entirely upon the option of the jury. Indeed, the very practice of bringing in ſpecial verdicts clearly implies, that juries are judges of law, as well as of fact. This is obſerved by the author of the *Trial per Pais*, or Law of Juries, who ſays, 'A ſpecial verdict is a plain proof that the jury 'are judges of law, as well as facts; for 'leaving the judgment of the law to the 'court, implies, that if they pleaſed they 'had that power of judgment in themſelves.'

It is obſerved by Blackſtone, that there are two different kinds of ſpecial verdicts, one, grounded on the ſtatute Weſtm. 2. 13 Edw. I. c. 30. § 2. wherein 'they ſtate 'the naked facts, as they find them to be 'proved, and pray the advice of the court 'thereon; concluding conditionally, that 'if upon the whole matter the court ſhall 'be of opinion that the plantiff had cauſe 'of action, they then find for the plain-'tiff; if otherwiſe, then for the defend-'ant.' Another, wherein 'the jury find 'a verdict generally for the plaintiff, but 'ſubject nevertheleſs to the opinion of the 'judge or the court above, on a *ſpecial* caſe 'ſtated by the counſel on both ſides with 'regard to a matter of law.' 'But in both 'theſe caſes,' he ſays, 'the jury may, if 'they think proper, take upon themſelves 'to determine at their own hazard, the 'complicated queſtion of fact and law; 'and, without either ſpecial verdict, or ſpe-

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'cial caſe, may find a verdict abſolutely 'either for the plaintiff or defendant[1].'

It is certain, that no jury ſhould ever find a fellow-citizen *guilty*, or ſhould bring in any verdict in which the word *guilty* is included, without a conviction of his having been guilty of ſome criminal action. But writing, printing, or publiſhing a book or pamphlet, is no more a criminal action, than riding in a poſt-chaiſe, or walking in a man's own dining-room. It muſt, therefore, be the contents of ſuch book or pamphlet that muſt determine its innocence or criminality. And if the jury attend not to the tendency of the publication, to the ſubject-matter of it, they determine, in general, nothing that is of the leaſt conſequence.

When a jury are reſtrained from inquiring into any thing, but the mere fact

[1] Commentaries, Book III. ch. 23.

of

of publication, in a trial for a libel, they certainly have not much to do, as that fact is generally ſufficiently clear, and frequently not in the leaſt diſputed. It has, however, been thought proper, that the jury might not be wholly deſtitute of ſomething to do, that upon them ſhould devolve the important office of filling up the blanks, if any ſhould occur in a libellous production. Thus, in the caſe of the King againſt the Dean of St. Aſaph, though the jury were not, it ſeems, able to decide, whether the Dialogue, for the publication of which that gentleman was tried, was, or was not a libel, yet they were competent to the buſineſs of deciding, whether F. ſtood for *Farmer*, and G. for *Gentleman*. This, however, could as well have been determined by a ſchool-boy of ten years of age, as by the moſt reſpectable jury in the kingdom. But upon this momentous point the jury were repeatedly interrogated by the court; and this point they clearly decided. In truth,

truth, in the generality of caſes, no buſineſs can be more trifling than the *application of the blanks*, about which ſo much has been lately ſaid. But it anſwers the purpoſe of throwing duſt in the eyes of the jury, and of leading them to ſuppoſe, that they are really engaged in ſomewhat ſerious, though they wholly neglect an inquiry into the innocence or criminality of the publication, which is the only important object of their attention.

NOTWITHSTANDING the attempts which have been occaſionally made by ſome of the judges, to deprive juries of the right of determining the law, as well as the fact, in criminal proſecutions, yet the doctrine laid down upon this ſubject ſeems never to have been implicitly aſſented to by the people. The claim on the part of the judges has been ſometimes very peremptorily made, but appears to have been juſtly conſidered as an uſurpation. The famous

John

John Lilburne, at his trial, addreſſing himſelf to the judges, ſaid, 'The jury by law 'are not only judges of fact, but of law 'alſo; and you that call yourſelves judges 'of the law, are no more but Norman 'intruders; and indeed, and in truth, if 'the jury pleaſe, are no more but cyphers, 'to pronounce their verdict [12].' And he afterwards ſaid, 'To the jury I apply, as 'my judges, both in the law and fact [13].' The jury having acquitted Lilburne, they were afterwards examined before the council of ſtate concerning the verdict. In general their reply was, 'That they had diſ-'charged their conſciences in the verdict, 'and that they would give no other an-'ſwer.' But Michael Rayner, one of the jury, ſaid, 'That he, and the reſt of the 'jury, took themſelves to be judges of 'matter of law, as well as matter of fact;

[12] State Trials, vol. II. p. 69. ſecond edition.

[13] Id. ibid.

'although

'although he confeſſed that the bench did 'ſay, that they were only judges of the 'fact[14].' And James Stephens, another of the jurymen, ſaid, that 'the jury having 'weighed all which was ſaid, and con-'ceiving themſelves (notwithſtanding what 'was ſaid by the counſel and bench to 'the contrary) to be judges of law, as, 'well as of fact, they had found him not 'guilty[15].'

Of law merely made by the judges, and not founded upon the ancient common law, or derived from any ſtatute, or ever formally aſſented to by the repreſentatives of the people, there is, perhaps, at preſent, a great deal too much in this country. The buſineſs of a judge is *jus dicere*, not *jus dare*; and in no caſes ſhould they be leſs allowed to make law, than in thoſe which

[14] State Trials, vol. II. p. 81. ſecond edition.

[15] Id. ibid.

concern

concern the extenſion of their own juriſdiction, and the limitation of that of juries. It would, perhaps, be as reaſonable, that kings ſhould be ſuffered themſelves to determine the bounds of their own prerogative, as that judges ſhould be permitted finally to decide, when the point in conteſt is, what is the extent of their own juriſdiction, and what is the extent of that of juries.

It has been determined, that in an information, or indictment, the ſlighteſt variation, a variation even of a ſingle word, if it affected the ſenſe, would vitiate ſuch information or indictment. Can it then be ſuppoſed, when the very forms of our legal proceedings require ſuch exactneſs in criminal proſecutions, that it was ever intended by our anceſtors, that the jury ſhould make no inquiry into the ſubject matter of a libel; or that the innocence, or criminality,

lity, of any book or paper ſtyled a libel, the writer or publiſher of which they are appointed to try, ſhould be to them a matter of indifference? It is impoſſible. The authority of no judge, however great his abilities, can ever make ſuch an abſurdity credible.

In the caſe of the Queen againſt Drake, judgment was given for the defendant, becauſe in the information againſt him, for a libel, the word *nec* was inſerted inſtead of *non*; and in that cauſe, lord-chief-juſtice Holt ſaid, that 'every word 'in the information is a mark of deſcrip-'tion of the libel itſelf[16].' From whence it may reaſonably be preſumed, that his lordſhip could hardly be of opinion, that the words *falſe*, and *ſcandalous*, and *malicious*, are merely words of courſe, or inferences of law.

[16] Salkeld's Reports, vol. III. p. 225.

In

In the opinion of the court of King's Bench, on a motion for arreſt of judgment, in the caſe of the king againſt Woodfall, which was delivered by lord Mansfield, it was ſaid, 'That where an act, in itſelf indifferent, if done with a criminal intent, becomes criminal, there the *intent* muſt be proved and found.' Let this doctrine be applied to the caſe of libels in general. Surely the writing, printing, or publiſhing, a book or pamphlet, are acts in themſelves perfectly indifferent; and, therefore, the criminality of ſuch books or pamphlets, or ſome evidence of criminal intention, ſhould be apparent to a jury, or they ought not to bring in a verdict of Guilty againſt any defendant.

In the caſe of the King againſt Horne, on a motion made in arreſt of judgment, it was ſaid by lord Mansfield, 'It is the 'duty of the jury to conſtrue plain words, 'and clear alluſions to matters of univerſal 'notoriety,

'notoriety, according to their obvious 'meaning, and as every body elſe who 'reads muſt underſtand them[17].' This ſurely ſeems to imply, that it is the buſineſs of the jury to enquire into ſomething elſe, beſides the mere fact of publication, or even filling up the blanks. But the truth is, that the doctrines which have lately been laid down reſpecting juries, are ſo incongruous to the general principles of Engliſh law, and to the proper modes of proceeding in our courts of juſtice, that thoſe who have advanced ſuch doctrines, have found it extremely difficult to preſerve any appearance of conſiſtency upon the ſubject.

ENGLISH juries have been in poſſeſſion, time immemorial, of the right of giving a general verdict, of determining both the law and the fact, in every criminal caſe

[17] Cowper's Reports of Caſes adjudged in the Court of King's Bench, p. 680.

brought

brought before them. They have exerciſed this right in innumerable inſtances. And there is no caſe in which it is more important to the ſecurity of the ſubject, that they ſhould continue to exerciſe this right, than in the caſe of libels. But on this ſubject ſome of the gentlemen of the law, probably from prudential conſiderations, ſeem to have been unwilling to ſpeak out clearly and explicitly: and others of them have appeared too ready to imbibe prejudices againſt the inſtitution and the rights of juries. From whence this has ariſen, it is not neceſſary here to inquire: but it may be obſerved, that every barriſter may have ſome hopes of being a judge; and may, therefore, not feel any violent repugnance to the extention of the power of a judge. Somewhat of profeſſional pride may alſo make them unwilling to acknowledge, that common jurymen are capable of determining what they call a point of law. But the truth is, that it requires very little

knowledge of law, to form a judgment of the deſign and tendency of ſuch books or papers as are brought into our courts of law under the denomination of libels. They are generally addreſſed to men of all profeſſions, and ſuch of them as can be underſtood only by lawyers, are not very likely to produce tumults or inſurrections.

An ingenious writer ſays, 'It has often 'been matter of aſtoniſhment with me, 'how a notion could ever obtain, that 'whether any paper was a libel or not, 'was a matter of law *, and was there-'fore, of neceſſity, to be left to the de-'termination of the judges. Almoſt every

* The ſame writer, in another place, inquires, by the knowledge of what law the inference is to be made, whether the writing publiſhed be a libel or not? 'Is it,' ſays he, 'by the law of eſtates in fee ſimple or fee tail, or of 'perſonal eſtates; or is it by the law of contingent re-'mainders and deviſes, of limitations, purchaſe, grant, or 'of deodands waifs and eſtrays, or by the rules of ſpecial pleading?' P. 48.

opinion

'opinion has ſome little foundation for 'it; and, I think, the preſent muſt have 'ariſen from the judges having formerly 'determined the matter. But it could not 'then be otherwiſe; becauſe the proſecu-'tions for ſtate libels were always carried 'on in the Star-chamber, where there was 'no jury. And it is ſelf-conviction to my-'ſelf, that this gave riſe to ſo ſtrange a 'conceit [18].'

THE ſame writer obſerves, that "Any "words almoſt may be uſed to convey a "libel. There are no technical or particu-"lar words appropriated to the purpoſe; "nor is there any peculiar form of ſen-"tence requiſite. A man may render the "ſame words libellous or not, by the ap-"plication he gives them, whether direct, "ironical, or burleſque, in jeſt or in ear-"neſt. The ſubject is generally political,

[18] Another Letter to Mr. Almon, in matter of Libel, p. 41.

" not legal; and a jury, particularly a ſpe-
" cial jury, can collect the drift of the
" writer, or publiſher, as well as the ableſt
" civilian, or common lawyer in the
" land [19]."

BLACKSTONE, though he has too implicity copied former law-compilers, in what he has ſaid on the ſubject of libels, yet conſiders the criminality of a publication not only as the principal object of inquiry, but alſo as a matter of fact. 'In a 'criminal proſecution,' he ſays, 'the ten-'dency which all libels have to create ani-'moſities, and to diſturb the public peace, 'is the ſole conſideration of the law. And, 'therefore, in ſuch proſecutions, the only '*facts** to be conſidered are, firſt, the 'making

[19] Another Letter to Mr. Almon, in matter of Libel, 49.

* Since the above was written, having examined a later edition of the *Commentaries*, I find that Blackſtone has altered the paſſage here cited, and inſerted the word *points* inſtead of *facts*. This is an evident accommodation to the

'making or publiſhing of the book or writ-
'ing; and ſecondly, whether the matter
'be criminal: and if both theſe points are
'againſt the defendant, then the offence
'againſt the public is complete[20].'

NOTWITHSTANDING the pains which judges have ſometimes taken, to perſuade juries that they had nothing to do but to find the mere fact of publiſhing, or of writing or printing, they have often diſcovered ſomething that appeared very much like an internal conſciouſneſs, that they were at leaſt upon doubtful ground, and that juries, if they poſſeſſed any degree of ſpirit or acuteneſs, would not implicitly follow their di-

the doctrine that has lately been ſo zealouſly propagated upon this ſubject; and the paſſage is alſo now better adapted to that *glorious uncertainty* in the law, the promotion of which ſeems to be one great object of ſome of its ſages. But it is manifeſt, that the original and uncorrupted opinion of Blackſtone was, that the criminality of a book or paper, whether it was, or was not, a libel, was a queſtion of *fact*, and not a queſtion of *law*.

[20] Commentaries, Book IV. ch. 11. §. 13. edit. 4to. Oxford, 1769.

rections.

rections. For it has been common for them, as well as the counſel for the crown, to dwell upon the criminality of the publications ſtyled libels, in order to induce the jury to bring in a verdict of Guilty againſt the defendant.

In the caſe of the ſeven biſhops, the jury determined both the law and the fact; the fact of their being the authors of the petition called a libel was clearly proved; and yet the jury found a general verdict of *not guilty*. But it ſhould be remarked, that, even in that memorable caſe, Sir Robert Wright, the chief juſtice, though very deſirous of convicting the biſhops, yet, in his charge to the jury, did not chooſe to tell them, that they were not to conſider whether it was a libel; but ſaid, after having gone through the evidence reſpecting the publication, 'Now, gentlemen, any body 'that ſhall diſturb the government, or make 'miſchief, and a ſtir among the people, is 'certainly

'certainly within the caſe of *Libellis Fa-*
'*moſis*; and I muſt in ſhort give you my
'opinion, I do take it to be a libel.' And when the jury withdrew, to conſider of their verdict, he agreed that they ſhould have the ſtatute-book with them[21]: from which it may be inferred, that even he thought the point of law a matter which was not wholly out of their cognizance.

On the trial of John Tutchin for a libel, at Guildhall, in the year 1704, lord-chief-juſtice Holt, in his charge to the jury, after reciting ſome paſſages from the ſuppoſed libel, made uſe of the following words: 'You
'are to conſider, whether theſe words I have
'read to you, do not tend to beget an ill
'opinion of the adminiſtration of the go-
'vernment[22].' It is evident from hence, that, in the opinion of this great judge, the jury were not confined to an inquiry con-

[21] State Trials, vol. IV. p. 392.
[22] Ibid. Vol. V. p. 546.

cerning

cerning the mere fact of publication, or the innuendoes, or the application of the blanks: but that it was their buſineſs to examine into the nature and tendency of the publication.

SIMILAR ſentiments appear alſo ſometimes to have been avowed by crown lawyers, even when pleading for the crown. Thus in the trial of Richard Franklin for a libel, before lord-chief-juſtice Raymond, the then ſolicitor general, Mr. Talbot, ſaid to the jury, 'Gentlemen, I hope it now 'plainly *appears to you*, that this pretended 'Hague letter is a libel; and, I may ſay, 'a very malicious and ſeditious one too [23].' It is, however, certain, that by crown lawyers, even ſince the revolution, the moſt ſlaviſh doctrines have been frequently maintained. Thus in the trial of John Tutchin, for a libel, in the reign of Queen Anne, it

[23] State Trials, vol. IX. p. 258.

was

was declared by Sir E. Northey, the attorney-general, that he would always proſecute any man who ſhould aſſert, "that the "people have power to call their governors "to account*."

THE doctrines which are propagated concerning libels, and the extent of the power of juries in trials for the publication of them, involve in them various abſurdities. Thus though it is affirmed, that juries are incapable of determining what is, or what is not a libel, yet in every proſecution of a bookſeller or printer for a libel, it is always taken for granted, that they are capable of determining this intricate and knotty point. For they are never, in any caſe, allowed to plead ignorance on this ſubject, as an exculpation of themſelves for having ſold or printed what is called a libel. No bookſeller or printer is permitted to urge in his own juſtification, that he

* State Trials, vol. V. p. 544.

did

did not know that any book or pamphlet, with the publication of which he is charged, was a libel. Now to take it for granted, that every common bookſeller, or printer, is a judge of what is, or of what is not a libel; and yet to aſſert, that twelve jurymen, perſons of the ſame rank, are incapable of determining it, is to the laſt degree prepoſterous and abſurd. But many bookſellers have been pilloried, and otherwiſe ſeverely puniſhed, for ſelling ſeditious libels; and ſome printers have been hanged for printing treaſonable libels.

We are told, that neither common, nor ſpecial juries, are competent to the deciſion of what is, or what is not a libel. But grand juries, it ſeems, poſſeſs more ſagacity. They muſt certainly poſſeſs ſome knowledge upon this ſubject. for it is allowed, that they have a right to find bills of indictment againſt libellers. In 1783, a grand jury at Wrexham, in the county of Denbigh,

Denbigh, found a bill of indictment againſt the Dean of St. Aſaph for the publication of a libel. The piece ſo denominated was a dialogue on the principles of government, written by ſir William Jones, and which had been, before its publication in Wales, printed and diſperſed at the expence of a public ſociety; who were of opinion, that the principles it contained were ſo juſt, and ſo favourable to the intereſts of national liberty, that they could not be too generally diſſeminated. In the indictment found at Wrexham, it was, however, ſtated, that this publication was a "falſe, wicked, ma-'licious, ſeditious, and ſcandalous libel." Now a plain man may be puzzled to diſcover how it ſhould happen, that the grand jury at Wrexham ſhould be ſo learned in the law of libels, and that the ſpecial jury at Shrewſbury, who afterwards tried the cauſe, and who were men of the ſame rank, ſhould have been ſo incompetent, as they were informed they were, to determine the

innocence

innocence or criminality of this publication. But the whole doctrine of libels, and the modes of proceeding concerning them, are attended with profound myſteries, to the comprehenſion of which common underſtandings ſeem not to be competent. It has been ſaid in divinity, that "where myſtery "begins, religion ends;" and perhaps it may be ſaid of law, with equal truth, that, whenever myſtery is introduced into it, there is an end of reaſon and of juſtice. Whatever is intended for the regulation of all men's conduct, ought to be made intelligible to all. Myſtery in law can anſwer no purpoſes, but thoſe of knavery, or of oppreſſion. But, from whatever cauſe it has proceeded, abundant pains appear to have been taken, in trials for libels, to bewilder the underſtandings of jurymen, and to involve the buſineſs in the darkneſs of legal jargon, and profeſſional ſophiſtry.

In indictments, or informations for libels, certain epithets are introduced, which are intended to be deſcriptive of the offence with which a perſon is charged who is proſecuted as a libeller. If it be a public libel, or ſuppoſed public libel, it is generally ſtated, in the information, or indictment, to be a "falſe, wicked, malicious, ſeditious, "and ſcandalous libel." If a book or paper ſtyled a libel be not proved to deſerve thoſe epithets, or if it does not appear to the jury to deſerve thoſe epithets, no evidence is produced to them that a libel has been publiſhed. For a book or paper that is not entitled to theſe epithets is not a libel. Whether a book or paper be falſe, or wicked, or malicious, or ſeditious, or ſcandalous, or whether they be otherwiſe, whether they are innocent or criminal publications, are facts, and facts undoubtedly to be inquired into by the jury. But whether they are queſtions of fact, or queſtions of law, in either caſe they come within the

cognizance

cognizance of the jury: for the jury has nothing elſe to determine, that is in the leaſt worthy the attention of a court of juſtice. The publication of a book or pamphlet is not a crime, independently of the criminal matter which it may contain; and if a jury find a man guilty without a conviction of the criminality of the publication with which he is charged, they convict a fellow-citizen without the leaſt reaſon or juſtice.

But clear as theſe principles are, much legal ſophiſtry has been employed, to perſuade juries, that they are to pay no attention to the epithets, in informations or indictments for libels, and that they are mere words of courſe, or inferences of law. The epithets *falſe*, *wicked*, *malicious*, *ſeditious*, and *ſcandalous*, have been compared by lord chief juſtice Jefferies, and other judges ſince, to the phraſes in indictments for murder, that the murder was committed by the party

party accuſed, *not having the fear of God before his eyes, and being moved and ſeduced by the inſtigation of the devil.* But ſurely it is the moſt contemptible ſophiſtry, to compare, and to confound, phraſes that are evidently words of courſe, and which from their nature are incapable of proof, with others that are capable of proof, and which are deſcriptive of, and characteriſtic of the offence with which the accuſed party is charged. If a murder be committed, it cannot be neceſſary to prove, that the murderer committed the fact *at the inſtigation of the devil*; but if a man be charged with writing, printing, or publiſhing a libel, the jury ought to be convinced, that the book or paper ſo ſtyled is falſe and ſcandalous, or malicious and ſeditious; or otherwiſe they condemn a man without the leaſt evidence of criminality; for writing, printing, or publiſhing, are acts in themſelves perfectly innocent and indifferent.

EVEN in the caſe of homicide, a man is not convicted of murder, if he has killed another by accident, and without intending it, or without being engaged in ſome unlawful act; and of all this the jury are judges. But we are told, that juries have nothing to do with the *intention* of a libeller. They are only to find the fact of publication. Thus it was ſaid by Jefferies, on the trial of Sir Samuel Bernardiſton, "The proof of the thing itſelf, proves the 'evil mind it was done with. If, then, 'gentlemen, you believe the defendant, 'Sir Samuel Bernardiſton, did write and 'publiſh theſe letters, that is proof enough 'of the words *maliciouſly*, *ſeditiouſly*, and '*factiouſly*, laid in the information [24].'

'WHEN I reflect,' ſays an able writer, who has been before quoted, 'that the de-'claration, information, or indictment for

[24] State Trials, vol. III. p. 320.

'a libel,

'a libel, charges the paper complained
'of with malice and ſedition, that the jury
'are ſworn well and truly to try this
'charge, and true deliverance make,—and
'that if the jury find him guilty, the ver-
'dict is drawn up; "The jurors ſay upon
"their oaths, that the defendant maliciouſly
"and ſeditiouſly publiſhed the paper in
"queſtion;" it is impoſſible for me not
'to declare, that the whole of the proceed-
'ing, and the only legal form of drawing
'up both information and verdict, give
'the lie to thoſe who tell a jury, that
"the epithets *falſe*, *ſcandalous*, and *mali-*
"*cious*, are at preſent (before any verdict
"finding the defendant guilty, which eſta-
"bliſhes the fact) all words of courſe; but
"if the writing be found a libel, they are
"inferences of law;" or elſe that "the
"epithets of malicious and ſeditious are in-
"ferences in law, with which they have
"nothing to do, and that whether the pa-

" per be criminal or innocent, is to them a " ſubject of indifference[25]."

In the notion of the epithets reſpecting libels being immaterial, or merely words of courſe, the opinions even of the crown lawyers ſeem not to be uniform. On the trial of Richard Franklin for a libel, in 1731, the ſolicitor general told the jury, that it was not material, whether the matters or things publiſhed in the libels were true or falſe, " if the publication thereof " was detrimental to the government, and " of a malicious, injurious, and ſeditious " deſign," &c. [26]. Here the truth or falſehood of the libel are ſpoken of as a matter of indifference; but the malicious, injurious, and ſeditious deſign of it, appears to be conſidered as an object of inquiry to the jury.

[25] Another Letter to Mr. Almon, in matter of Libel, p. 54, 55.

[26] State Trials, vol. IX. p. 258.

THE general practice of introducing the term *falſe*, in indictments or informations for libels, ſeems ſufficiently to prove, that it was the opinion of our anceſtors, that falſehood was neceſſary to conſtitute a libel. Nor is it eaſy to conceive, that a conſcientious jury can return upon their oaths, that a man has publiſhed a *falſe* and *malicious* libel, which they muſt do when they convict a public libeller, if they are not in their own minds convinced of the *falſehood* and the *malice*. With reſpect to private libels, their truth or falſehood has always been conſidered as a matter of ſo much importance, that it has been laid down as a rule in the court of King's Bench, that the court will not grant an information for a private libel charging a particular offence, unleſs the proſecutor will deny the charge upon oath[27].

[27] Douglas's Reports of Caſes argued and determined in the Court of King's Bench, p 271.

It has been ſaid, that juries are not to judge of the *intention* of a libeller, becauſe *intention* in this caſe is incapable of proof. But upon this it has been juſtly remarked, that 'Criminal intention in the publication 'of a libel may be proved by two ſorts of 'evidence; one *internal*, ariſing from the 'nature of the paper; the other *external*, 'from the circumſtances accompanying the 'act of publication[28].' And of the whole of this the jury are the true and proper judges. It was certainly the opinion of lord chief juſtice Holt, that the intention of the writer was a proper ſubject for the jury in matter of libel. In the caſe of the King againſt Brown, that judge ſaid, 'An in-'formation will be for ſpeaking ironi-'cally. And Mr. Attorney ſaid, 'twas 'laid to be wrote *ironicè*, and he ought to 'have ſhewed at the trial that he did not 'intend to ſcandalize them; and the jury

[28] Letter to the Jurors of Great Britain, 8vo. 1771. p. 14.

'are

'are judges *quo animo* this was done, and 'they have found the ill intent[29].' It is alſo ſaid in Viner of a libel, that "the mind "with which it was made is to be re- "ſpected[30]."

To be regardleſs of the intention with which an act was done, is not conſonant to the maxims of Engliſh law. *Omne actum ab agentis intentione eſt judicandum.* Every act is to be judged from the intention of the agent. Mr. Juſtice Holloway, one of the judges of the court of King's Bench, in the caſe of the ſeven biſhops, evidently conſidered the jury as judges of *intention*, and that they ſhould attend to the evidence of *ſedition*, in a trial for matter of libel. For he ſaid to the jury, 'If you are ſatisfied, there was an

[29] Lutwyche's Reports of Caſes adjudged in the Court of King's Bench, in the reign of Queen Anne, p. 86.

[30] General Abridgment of Law and Equity, vol. XV. p. 85.

'ill

'*ill intention* of *ſedition*, or the like, you 'ought to find them guilty.' And Mr. Juſtice Powell, in the ſame cauſe, ſaid to the jury, 'Gentlemen, to make it a libel, 'it muſt be falſe, it muſt be malicious, and 'it muſt tend to ſedition [31].'

In many inſtances, the conduct of the Judges, in trials for libels, has manifeſted a moſt ſhameful partiality to the crown; and this has happened, not only during the reigns of the princes of the houſe of Stuart, but ſince the Revolution, and ſince the acceſſion of the houſe of Hanover. But, according to the ſound maxims of Engliſh law, any partiality, manifeſted by the judge againſt the perſon accuſed, is a violation of the duty of his office. Coke ſays, 'The court ought to be inſtead of counſel 'for the priſoner, to ſee that nothing be 'urged againſt him contrary to law and

[31] State Trials, vol. IV. p. 390.

'right.

'right. Nay, any learned man that is 'preſent may inform the court, for the 'benefit of the priſoner, of any thing that 'may make the proceedings erroneous. 'And herein there is no diverſity between 'the peer and another ſubject. And to 'the end that the trial may be more in-'different, ſeeing that the ſafety of the 'priſoner conſiſteth in the differency of 'the court, the judges ought not to deli-ver their opinions before-hand, of any 'criminal caſe that may come before them 'judicially [32].' But, in libel cauſes, it has been no uncommon thing to ſee the judges acting as counſel againſt the perſons under trial: which ſhews the extreme danger and impropriety of leaving the innocence, or criminality, of ſuch publications as are termed libels, wholly to the determination of the court.

[32] Inſtitutes, Part III. p. 29. edit. 1660.

To

To ſupoſe, from motives of delicacy, that the judges will always be impartial, and that they will never be under any undue influence, in cauſes between the crown and the ſubject, would be extremely weak and abſurd; and, indeed, no man can be of that opinion, who has ever read the *State Trials*, or who has been a frequent attendant in the courts in crown cauſes.

THAT there have been many inſtances of judges, who have given very erroneous judgments, and whoſe conduct has been extremely criminal, is a fact too notorious to be denied. Lord chief juſtice Vaughan ſays, 'if any man thinks that a perſon 'concerned in intereſt, by the judgment, 'action, or authority exerciſed upon his 'perſon or fortunes by a judge, muſt ſub-'mit in all, or any of theſe, to the im-'plied diſcretion and unerringneſs of his 'judge,

'judge, without ſeeking ſuch redreſs as
'the law allows him, it is a perſuaſion
'againſt common reaſon, the received law,
'and uſage both of this kingdom, and al-
'moſt all others. If a court, inferior or
'ſuperior, hath given a falſe or erroneous
'judgment, is any thing more frequent
'than to reverſe ſuch judgments by writs
'of falſe judgment, of error, or appeals,
'according to the courſe of the king-
'dom?

'If they have given corrupt and diſho-
'neſt judgments, they have in all ages
'been complained of to the king in the
'Star-chamber, or to the parliament. An-
'drew Horne, in his Mirror of Juſtices,
'mentions many judges puniſhed by king
'Alfred, before the conqueſt, for corrupt
'judgments, and their particular names
'and offences, which could not be had
'but from the records of thoſe times. Our
'ſtories mention many puniſhed in the

'reign

'reign of Edward the Firſt: our parlia-
'ment rolls of Edward the Third's time,
'of Richard the Second's time, for the
'pernicious reſolutions given at Notting-
'ham caſtle, afford examples of this kind.
'In latter times, the parliament journals
'of 18 and 21 Jac. the judgment of the
'ſhip-money, in the time of Charles the
'Firſt, queſtioned, and the particular
'judges impeached [33].'

THAT the conduct of the judges, even in their collective capacity, may ſometimes be as cenſurable and corrupt as that of any other claſs of men, the deciſion of the judges in the caſe of ſhip-money, affords, indeed, a very memorable inſtance. Lord Clarendon himſelf, though both a lawyer and a royaliſt, expreſſes great indignation at the iniquitous conduct of the judges at that period, and ſpeaks of their deciſion as

[33] Vaughan's Reports, p. 139.

having

having been productive of the moſt perni-
cious conſequences. He remarks, that the
payment of ſhip-money was more firmly
oppoſed, after the judges had declared it to
be legal, than it had been before. 'That
'preſſure,' ſays he, 'was borne with much
'more chearfulneſs before the judgment
'for the king, than ever it was after;
'men before pleaſing themſelves with do-
'ing ſomething for the king's ſervice, as a
'teſtimony of their affection, which they
'were not bound to do; many really be-
'lieving the neceſſity, and therefore think-
'ing the burthen reaſonable; others ob-
'ſerving that the advantage to the king
'was of importance, when the damage to
'them was not conſiderable; and all
'aſſuring themſelves, that when they
'ſhould be weary, or unwilling to con-
'tinue the payment, they might reſort to
'the law for relief, and find it. But when
'they heard this demanded in a court of
'law,

'law, as a right, and found it, by ſworn
'judges of the law, adjudged ſo, upon ſuch
'grounds and reaſons as every ſtander-by
'was able to ſwear was not law, and ſo
'had loſt the pleaſure and delight of being
'kind and dutiful to the king; and, in-
'ſtead of giving, were required to pay,
'and by a logic that left no man any thing
'which he might call his own, they no
'more looked upon it as the caſe of one
'man, but the caſe of the kingdom, not as
'an impoſition laid upon them by the
'king, but by the judges; which they
'thought themſelves bound in conſcience
'to the public juſtice not to ſubmit to.'—
'And here the damage and miſchief can-
'not be expreſſed, that the crown and
'ſtate ſuſtained by the deſerved reproach
'and infamy that attended the judges, by
'being made uſe of in this and like acts of
'power; there being no poſſibility to pre-
'ſerve the dignity, reverence, and eſtima-
'tion

'tion of the laws themſelves, but by 'the integrity and innocency of the 'judges [34].'

In no caſes have the judges behaved with more ſhameful partiality, than in trials for libels, and in trials for high treaſon. In many inſtances, in ſuch caſes, their conduct has been ſo notoriouſly indefenſible, that the *State Trials* have been pleaſantly termed, "a libel upon the judges." Indeed, the unfavourable ſtatement of their conduct, in that collection, is ſo much the more libellous, as it is unqueſtionably true. Hence, however, ſufficient evidence may be adduced of the extreme folly and abſurdity, which would be manifeſted by the people of this country, if they were to ſuffer juries to be deprived of any part of their ancient power and authority in ſuch caſes. Theſe are the caſes, in which judges are the moſt

[34] Hiſt. Vol. I. Part I. p. 69, 70. Edit. 8vo. 1707.

likely

likely to be under an undue influence on the part of the crown; and theſe, therefore, are the caſes, in which the ſubject has the moſt occaſion for the protection of a jury.

NOTHING can be more infamous, nor more inconſiſtent with a free conſtitution, than the doctrines which have been maintained by ſome of the judges concerning libels. Mr. Juſtice Allybone, in the caſe of the ſeven biſhops, laid down the following doctrine reſpecting libels. 'I think, in the 'firſt place, that no man can take upon 'him to write againſt the actual *exerciſe* of 'the government, *unleſs he have leave from 'the government*, but he makes a libel, be 'what he writes true or falſe; for if once we 'come to impeach the government by way 'of argument, 'tis the argument that makes 'the government or nor the government; 'ſo that I lay down that in the firſt place, 'that the government ought not to be im-

'peached

'peached by argument, nor the exerciſe of
'the government ſhaken by argument; be-
'cauſe I can manage a propoſition in itſelf
'doubtful, with a better pen than another
'man: This, ſays I, is a libel. Then I lay
'down this for my next poſition, That no
'private man can take upon him to write
'concerning the government at all; for
'what has any private man to do with the
'government, if his intereſt be not ſtirred
'or ſhaken? It is the buſineſs of the go-
'vernment to manage matters relating to
'the government; it is the buſineſs of ſub-
'jects to mind only their own properties
'and intereſts. If my intereſt is not ſhaken,
'what have I to do with matters of govern-
'ment? They are not within my ſphere.
'If the government does not come to ſhake
'my particular intereſt, the law is open for
'me, and I may redreſs myſelf by law:
'and when I intrude myſelf into other
'men's buſineſs, that does not concern my
'particular intereſt, I am a libeller. Theſe

'I have

'I have laid down for plain propoſitions; 'now let us conſider farther, whether if I 'will take upon me to contradict the go- 'vernment, any ſuſpicious pretence that I 'ſhall put upon it ſhall dreſs it up into 'another form, and give it a better deno- 'mination; and truly I think it is the 'worſe, becauſe it comes in a better dreſs; 'for by that rule, every man that can put 'on a good vizard, may be as miſchievous 'as he will to the government at the bot- 'tom: ſo that whether it be in the form of 'a ſupplication, or an addreſs, or a peti- 'tion, if it be what it ought not to be, let 'us call it by its true name, and give it its 'right denomination, it is a libel[35].'

On the trial of Henry Carr at Guildhall, for a libel, before lord-chief-juſtice Scroggs, in 1680, Sir George Jefferies, then recorder of London, in his ſpeech, as counſel for the crown, ſaid, 'All the judges of Eng-

[35] State Trials, vol. IV. p. 391.

'land

'land having been met together, to know 'whether any perſon whatſoever may ex- 'poſe to the public knowledge any manner 'of intelligence, or any matter whatſoever 'that concerns the public: They give it in 'as their reſolution, that no perſon what- 'ſoever could expoſe to the public know- 'ledge any thing that concerned the affairs 'of the public, without licence from the 'king, or from ſuch perſons as he thought 'fit to entruſt with that affair[36].' And he afterwards ſaid, uncontradicted by the court, 'It is the opinion of all the judges of Eng- 'land, that it is the law of the land, that 'no perſon ſhould offer to expoſe to pub- 'lic knowledge any thing that concerns the 'government, without the king's imme- 'diate licence [37].' The chief juſtice Scroggs, in ſumming up the evidence to the jury, on the ſame trial, expreſſed himſelf in the following terms: 'I muſt recite what Mr.

[36] State Trials, vol. III. p. 58.
[37] Ibid.

'Recorder told you at firſt, what all the 'judges of England have declared under 'their hands. The words I remember are 'theſe: "When by the king's command we "were to give in our opinion what was to "be done in point of the regulation of the "preſs; we did all ſubſcribe, that to print "or publiſh any news-books or pamphlets "of news whatſoever, is illegal; that it is a "manifeſt intent to the breach of the peace, "and they may be proceeded againſt by law "for an illegal thing[38]."

In the trial of the ſeven biſhops, Sir William Williams, the ſolicitor-general, ſaid to the jury, 'If any perſon, in any paper, 'have ſlandered the government, you are 'not to examine who is in the right, and 'who is in the wrong, whether what they 'ſaid to be done by the government be legal 'or no; but whether the party have done

[38] State Trials, vol. III. p. 64.

'ſuch

'ſuch an act[39].' It is a circumſtance not unworthy of notice, that this learned lawyer had himſelf acquired his knowledge in the law of libels at no inconſiderable expence. He had been fined 10,000l. by the court of King's Bench, in the firſt year of the reign of king James the Second, for publiſhing a libel called "Dangerfield's "Narrative." He paid 8000l. of it, whereupon ſatisfaction was acknowledged upon record. He was ſpeaker of the houſe of commons when he publiſhed the libel, and puliſhed it by order of the houſe[40].

It is obſerved by an acute writer, who has been repeatedly quoted, that 'the whole 'doctrine of libels, and the criminal mode 'of proſecuting them by information, grew 'with that accurſed court the Star-chamber. 'All the learning intruded upon us *de libel-*

[39] State Trials, vol. IV. p. 386.

40 Ibid. vol. X. Appendix, p. 34.

'*lis famoſis* was borrowed at once, or rather 'tranſlated, from that ſlaviſh imperial law, 'uſually denominated the civil law. You 'find nothing of it in our books before 'the time of queen Elizabeth and ſir Ed-'ward Coke[41].'

'THE matter of libel, independent of 'the ſtatutes *de ſcandalis magnatum*, was 'ſcarcely heard of in this iſland, until the 'time of Coke; and the ſhort caſe of '*Lamb*, by him reported, ſtates the law as 'reſolved upon this head, in the reign of a 'Stuart, by the ſevereſt of all courts, the 'Star-chamber, the fountain of this ſort of 'proſecution. And yet this dreadful court, 'upon ſolemn argument, rules, "that "every one who ſhall be convicted, either "ought to be a contriver of the libel, or "a procurer of the contriving of it, or a

[41] Letter concerning Libels, Warrants, the Seizure of Papers, &c. 8vo. 1765. p. 20.

"malicious

" malicious publiſher of it, knowing it to " be a libel[42]."

'THE notion of purſuing a libeller in a 'criminal way at all, is alien from the na- 'ture of a free conſtitution. Our ancient 'common law knew of none but a civil re- 'medy, by ſpecial action on the caſe for 'damages incurred, to be aſſeſſed by a jury 'of his fellows. There was no ſuch thing 'as a public libel known to the law. It 'was in order to gratify ſome of the great 'men, in the weak reign of Richard the 'Second, that ſome acts of parliament 'were paſſed to give actions for falſe tales, 'news, and ſlander of peers, or certain 'great officers of ſtate, which are now 'termed *de ſcandalis magnatum*[43].'

ONE maxim concerning libels, of which we have lately ſo frequently heard, namely,

[42] Another Letter to Mr. Almon, in matter of Libel, p. 31, 32.

[43] Ibid.

that

that it is of no conſequence whether a libel be true or falſe, is ſo little conſonant to common ſenſe, that one is tempted to inquire, how this maxim came to be a part of the law of England? and upon inquiry it appears, that this admirable maxim derived its origin from a court truly worthy of it. In Viner's *Abridgment*, we find it ſtated, that 'the court held, that a libeller 'was puniſhable, though the matter of the 'libel is true[44].' But when we examine into the authority for this, and the court by which it was decreed, we are referred, as to the earlieſt authority, to Want's caſe in the court of Star-chamber. Thus it appears, that this maxim originated in the infamous court of Star-chamber, and being retailed from one law reporter or compiler to another, we are at length gravely and confidently informed, that this is a part of the law of England.

[44] Vol. XV. p 58.

THE fact is, that there is very little law upon the ſubject of libels to be found in the books, and what there is appears to be, for the moſt part, of no legitimate origin. In Viner's "General Abridgment of Law and "Equity," in twenty-three volumes, folio, there are not more than ſeven pages on the law of libels; and a great part of the caſes referred to are caſes in the Star-chamber. There being, therefore, ſuch a ſcarcity of real law upon the ſubject, the Star-chamber code was received by ſome of the judges, as no other happened to be fabricated. Accordingly the preſent ſyſtem of libel law, is manifeſtly little more than a collection of maxims retailed from the court of Star-chamber, and having no other legal ſanction than the occaſional adoption of ſome of the judges. In ſhort, almoſt the whole of what is now called the law of libels, is the mere fabrication of the profeſſors and officers of the law, and was never ratified by the parliament, or the people

ple of England, nor any part of the ancient common law of the land.

MODERN precedents, and the mere opinions of judges, ought not to be implicitly received as law, when they tend to the diminution of the liberty of the ſubject, and relate to points which may be conteſted between the ſubject and the crown. Matters in which the intereſts of general liberty are concerned, are of too ſacred and important a nature, to be entirely ſubmitted to the determination of magiſtrates appointed by the crown. In affairs relative to private property, in which the judges may be preſumed wholly diſintereſted, there is leſs danger in permitting them to make the law; though, perhaps, upon inquiry it will be found, that it is to this ſpecies of law that we are much indebted for that variableneſs, and that uncertainty in the law, which is ſo profitable to its practitioners, and ſo prejudicial to the people at large.

THE

THE doctrines concerning libels, which are to be found in ſome of our law-books, are ſo deſtitute of any legitimate origin, ſo evidently ſprung from the court of Star-chamber, and ſo inconſiſtent with every principle of a free conſtitution, that they deſerve much more to be ſcouted, than ſome of thoſe black letter caſes, which have been treated with ſuch extreme contempt by the preſent chief-juſtice of the King's Bench. Lord Mansfield long ago decided for common ſenſe againſt Dyer; and it would be well if juries would acquire ſo much ſpirit and acuteneſs, as to decide, in trials for libels, for common ſenſe, and common juſtice, even againſt Hawkins, or any other ſolemn reporter or compiler of Star-chamber law.

OF the doctrines concerning libels, which are to be found in ſome of our law compilations, it may not be improper here to give a few ſpecimens. Of the nature of a libel

a libel the following definition has been given: 'A *libel*, called *famoſus libellus*, *ſeu* 'infamatoria *ſcriptura*, is taken for a ſcan- 'dalous writing, or act done, tending to 'the defamation of another. And this 'may be, and ſometimes is, againſt a pub- 'lic, and ſometimes againſt a private per- 'ſon; ſometimes againſt the living, ſome- 'times againſt the dead [45].'

HAWKINS ſays, 'It ſeemeth, that a libel, 'in a ſtrict ſenſe, is taken for a malicious 'defamation, expreſſed either in printing 'or writing, and tending either to blacken 'the memory of one who is dead, or the 'reputation of one who is alive, and to ex- 'poſe him to public hatred, contempt, or 'ridicule [46].'

'SUCH ſcandal as is expreſſed in a ſcoff- 'ing and ironical manner, makes a writ-

[45] Sheppard's Action upon the Caſe for Slander, edit. 1662. p. 115.

[46] Pleas of the Crown, Book I. p. 193.

'ing

'ing as properly a libel, as that which is 'expreſſed in direct terms.'——'Nor can 'there be any doubt, but that a writing 'which defames private perſons only, is as 'much a libel as that which defames per- 'ſons intruſted with a public capacity, in- 'aſmuch as it manifeſtly tends to create ill 'blood, and to cauſe a diſturbance of the 'public peace. However, it is certain, 'that it is a very high aggravation of a li- 'bel that it tends to ſcandalize the govern- 'ment, by reflecting on thoſe who are en- 'truſted with the adminiſtration of public 'affairs, which doth not only endanger the 'public peace, as all other libels do, by 'ſtirring up the parties immediately con- 'cerned in it to acts of revenge, but alſo 'has a direct tendency to breed in the peo- 'ple a diſlike of their governors, and in- 'cline them to faction and ſedition [47].'

[47] Pleas of the Crown, Book I. p. 194.

'THE

'THE taking of a copy of a libel is a libel, 'becauſe it comprehends all that is neceſ-'ſary to the making of a libel; it has the 'ſame ſcandalous matter in it, and the ſame 'miſchievous conſequences attending it at 'firſt. For it is by this means perpetuated, 'and it may come into the hands of other 'men, and be publiſhed after the death of 'the copier; and if men might take copies 'with impunity, by the ſame reaſon print-'ing of them would be no offence; and 'then farewell to all government[48].' 'He 'who diſperſes libels, though he does not 'know the effect of them, nor ever heard 'them read, is puniſhable[49].'

SIR Edward Coke maintained, in the caſe of Edward againſt Wootton, that 'a per-'ſon *libelling himſelf* is puniſhable by the

[48] Viner's General Abridgment of Law and Equity, vol. XV. p. 87.

[49] Ibid.

'civil

'civil law; and it ſeemed to him, that he 'ſhould be ſo in the Star-chamber [50].'

'If one finds a libel againſt a private 'man, he may either burn it, or deliver it 'to a magiſtrate immediately; but if it 'concerns a magiſtrate, or other public per-'ſon, he ought immediately to deliver it to 'a magiſtrate, that the author may be 'found out [51].'

'Hawkins ſays, 'That it is far from be-'ing a juſtification of a libel, that the con-'tents thereof are true, or that the perſon 'upon whom it is made has a bad reputa-'tion, ſince the greater appearance of truth 'there is in any malicious invective, ſo 'much the more provoking it is [52].'

Sheppard ſays, 'The offence, if it be 'againſt a public perſon, a magiſtrate, a

[50] Viner's General Abridgment of Law and Equity, vol. XV. p. 87.

[51] Ibid. p. 88.

[52] Pleas of the Crown, p. 194.

'lord,

'lord, or eminent man, is greater, and the 'puniſhment will be greater, than where 'it is againſt a private perſon, or meaner 'man[53].'

COKE informs us, in his *Reports*, that it was obſerved, in a caſe which he recites, 'that Job, who was the mirror of patience, 'became *quodammodo* impatient when libels 'were made of him; and therefore it ap-'pears of what force they are to provoke 'impatience and contention[54].'

IN order, however, to give us ſome conſolation with reſpect to the doctrine of libels, ſerjeant Hawkins informs us, that 'it hath been reſolved, that he who barely 'reads a libel in the preſence of another, 'without knowing it before to be a libel, 'or who hearing a libel read by another, 'laughs at it, or who barely ſays, That

[53] Action upon the Caſe, p. 117.

[54] Vol. III. p. 126. Wilſon's edit. 8vo. 1777.

'ſuch

'ſuch a libel is made upon ſuch a perſon 'whether he ſpeaks it with or without 'malice, ſhall not, in reſpect of any ſuch 'act, be adjudged the publiſher of it[55].'

We alſo learn from Mr. ſerjeant Salkeld, that though we may not ſpeak truth of a miniſter of ſtate, or arraign the proceedings of any adminiſtration, however juſtly, yet we may abuſe all mankind collectively, or the divines, or lawyers, as bodies, though not individually, without being guilty of a libel. 'Where a writing 'inveighs againſt mankind in general, 'or againſt a particular order of men; 'as for inſtance, men of the gown, this 'is no libel, but it muſt deſcend to par-'ticulars and individuals to make it a 'libel[56].'

[55] Pleas of the Crown, p. 196.

[56] Salkeld's Reports, vol. III. p. 224.

FEW things are more extraordinary in the hiſtory of this country, than that ſuch doctrines ſhould ever have been allowed to prevail in it as law, even for an hour, as thoſe which are to be found in ſome of our law compilations under the denomination of the law of libels. But in juſtification of the honour of our anceſtors, it ſhould be obſerved, that this is a ſpecies of law never framed by the parliament of England, nor ever formally aſſented to or ratified by the people. Theſe legal innovations were not, indeed, ſufficiently attended to at their introduction; and the people were much bewildered by thoſe technical phraſes, and that legal jargon, in which this ſubject has been ſo ſtudiouſly enveloped.

IT was in the year 1641, that the court of Star-chamber was aboliſhed by act of parliament; and in the act for its abolition it was ſtated, that 'the proceedings, cen-'ſures, and decrees of that court, had by

'experience

'experience been found to be an intolerable 'burden to the ſubjects, and the means to 'introduce an arbitrary power and govern-'ment.' When this court was aboliſhed, its doctrines ſhould have been aboliſhed with it. At leaſt, no deciſions of that court ſhould ever afterwards have been urged in this country as authorities. But though the Star-chamber, from its deſpotic nature and tendency, was aboliſhed by expreſs ſtatute; yet its doctrines were ſo pleaſing to crown lawyers, and prerogative judges, that they afterwads occaſionally ventured to broach them in the courts, and they alſo found their way into ſome law compilations. In this irregular and ſurreptitious manner did theſe contemptible dogmas obtain the name of law; and the ſupineneſs and inattention of the people, and their ignorance of the various modes of legal artifice and chicanery, prevented them from being ſufficiently aware of the injury and the inſult that were offered them.

THE poſitions concerning libels, which are laid down in Coke's Reports [57], are evidently thoſe doctrines which were maintained upon this ſubject in the court of Star-chamber, and are much the ſame with thoſe that are to be found in Viner and in Hawkins. It is, indeed, certain, that notwithſtanding the very reſplendent profeſſional merit of Coke, yet, as a crown lawyer, he ſometimes acted in a manner that will ever reflect diſhonour on his memory. This was particularly the caſe when he appeared as attorney-general againſt Sir Walter Raleigh, whom he treated with great inſolence, injuſtice, and brutality. It was after he was diſgraced at court, that he chiefly diſtinguiſhed himſelf as a conſtitutional lawyer, and a friend to the liberties of his country. He was then principally concerned in framing the famous Petition of Right, and in other ſpirited exertions in

[57] Vol. III. fol. 125, 126, &c. Wilſon's edit. 8vo, 1777.

ſupport

ſupport of the conſtitution. It is, indeed, ſometimes a conſiderable benefit to the public, when great lawyers are ill uſed by kings, or miniſters of ſtate. In ſuch caſes they are led to employ thoſe abilities, and that knowledge, in ſupport of the liberty of the ſubject, which might otherwiſe be employed to its extreme injury.

It is an incontrovertible fact, that in conſequence of the doctrines concerning libels, which have been propagated by prerogative judges, and crown lawyers, and the power which judges have aſſumed in ſuch caſes, and to which juries have too implicitly ſubmitted, men have been found guilty, and received very ſevere ſentences, for writings, or publications in which there was not the leaſt degree of criminality. Of this ſir Samuel Bernardiston, Mr. Richard Baxter, Benjamin Keach, and Henry Carr, all whoſe caſes are re-

corded in the State Trials, are ſtriking inſtances.

It was in 1683, that ſir Samuel Bernardiston was tried before ſir George Jefferies, for the publication of ſeveral ſcandalous and malicious libels. Theſe pretended libels were nothing but private letters, written in confidence to his friends, and containing the news which then happened to be in circulation, and ſome remarks on the ſtate of public affairs at that period. As he was known to be a friend to the liberties of his country, his letters were intercepted at the poſt-office; and their being ſent thither was conſidered as a publication. On this charge he was found guilty by the jury, and fined ten thouſand pounds.

In the year 1685, Mr. Richard Baxter, a man of diſtinguiſhed piety and virtue, and who, from motives of conſcience, had

had refuſed a biſhopric, was tried before the ſame judge for the publication of his "Paraphraſe on the New Teſtament," which was ſtyled a ſcandalous and ſeditious libel againſt the government. Several paſſages were ſelected, which were ſtated to contain reflections on the prelates of the church of England, and he was therefore charged with having been guilty of ſedition. The fact was, that he had really written with ſo much moderation concerning the biſhops, that he incurred ſome cenſure, from warm men among the Diſſenters, on that account. This reſpectable man was, however, treated by the chief-juſtice with the utmoſt brutality of reproach; and the jury were mean and ſervile enough to find him guilty: upon which he was ſentenced to pay a fine of five hundred pounds, to be impriſoned till he had paid it, and to give ſureties for his good behaviour for ſeven years[58]. As he

[58] State Trials, vol. X. Appendix, p. 40.

was unable to pay the fine, he remained more than a year and half in the King's Bench priſon; but his fine was afterwards remitted, and he was ſet at liberty.

In 1664, Mr. Benjamin Keach was tried at the aſſizes at Ayleſbury, before lord-chief-juſtice Hyde, for writing a little book called "the Child's Inſtructor," in which he had oppoſed the doctrine of infant baptiſm, and maintained that laymen might preach the goſpel. Theſe were the moſt dangerous doctrines contained in his book; but the chief-juſtice mentioned it as an aggravating circumſtance, that Keach had ſpoken of infant-baptiſm in his performance in ſuch a manner, as implied that the child of a Turk or a Heathen was "equal with the "child of a Chriſtian [59]." His lordſhip accordingly pronounced it to be a libel, and bullied the jury till they brought in a ver-

[59] State Trials, vol. II. p. 548.

dict

dict of *guilty*, which they appear to have done very unwillingly. However, on this contemptible charge, Mr. Keach was fined, and twice pilloried.

HENRY CARR was tried in the court of King's Bench, at Guildhall, in 1680, for a libel, entitled, "The Weekly Packet of advices from Rome." The libellous paſſage ſtated in the information, and upon which he was convicted, contained only a kind of allegorical repreſentation of the powerful effects of money, and of its tendency to "make juſtice deaf as well as blind," but without any application to any particular perſon or perſons[60]. The jury, however, found Carr guilty; and the judge, Sir William Scroggs, aſſured them, that in ſo doing they had acted like honeſt men[61].

[60] Vid. State Trials, vol. III. p. 60.

[61] Id. ibid.

It may, perhaps, be alleged, that theſe inſtances of oppreſſion were before the Revolution; but if the ſame doctrines are maintained now, that were maintained by the proſtituted crown lawyers of thoſe times, it is neceſſary to point out whither they would lead, and what is their tendency. And the fact is, that the doctrines concerning libels, which are now propagated, are the ſame that were maintained before the Revolution. There has been no new law upon the ſubject; and it is only the ſpirit of the times, and in conſequence a more moderate exerciſe of the powers of government, that has occaſioned that freedom of the preſs which has actually appeared in this country. The ſame doctrine that the epithets *falſe*, and *ſcandalous*, and *malicious*, and *ſeditious*, in indictments or informations for libels, are mere words of courſe, or inferences of law, and not at all to be attended to by the jury, which was aſſerted by Jefferies and Scroggs,

by

by the worſt judges, and moſt proſtituted lawyers, during the reigns of the Stuarts, has been repeatedly aſſerted even in the preſent reign. None of the Star-chamber doctrines concerning libels have ever been formally diſavowed; they are ſtill brought forward whenever it is thought proper or expedient; the attorney-general may ſtill proſecute whom he pleaſes, and when he pleaſes; and the judges of the court of King's Bench ſtill poſſeſs the power of diſcretionary puniſhment. If proſecutions are leſs frequent, and if ſentences are leſs ſevere, this ariſes merely from the ſpirit of the times, and not from any change in what is called the law upon the ſubject. And they who ſuppoſe, that there have been no inſtances of oppreſſion and injuſtice, in proſecutions for libels, ſince the Revolution, muſt be little read in the hiſtory of ſuch proſecutions.

It is a matter well worthy the ſerious conſideration of the people of this country, whether they will continue to have doctrines obtruded upon them as law, or whether they will receive them as ſuch, which are repugnant to every principle of freedom, which appear to have been coined in the Star-chamber, or introduced into it from the imperial code, which were never authorized by the legiſlature, and which have no legal ſanction but the occaſional adoption of ſome of the judges.

In truth, moſt of the doctrines concerning libels, which are to be found in Viner and in Hawkins, are entitled to no other reception from the people of England, but that of the moſt indignant contempt. They are totally inconſiſtent with every principle of a free conſtitution, they never formed any authentic part of the legal code of this country, they were never ratified by parliament,

ment, they were never authorized by our anceſtors.

If theſe doctrines are ſuffered to prevail, we ſhall not be permitted in this free country to ſpeak truth, either of the dead, or of the living. No hiſtory can be written; for no true hiſtory of any country has ever appeared, in which the dead were not libelled; that is, in which ſome evil was not ſpoken of them. No man can publiſh any animadverſions on the meaſures of government, however iniquitous, but he publiſhes a libel. The conduct of no miniſter, however wicked, can be arraigned by any publications from the preſs. If the facts which are ſtated be unqueſtionably true, the greater is the criminality of the publication. At leaſt, the truth of the facts can never be alleged in juſtification of what is publiſhed. But theſe doctrines are no part of the ancient common law of England, nor have they ever been ratified

fied by the legiſlature. It is a ſpecies of law repugnant to the principles of a free conſtitution; it is law only *made by the judges*; and which the people ſhould firmly and unanimouſly oppoſe. In many inſtances the judges, under the pretence of declaring what the common law is, have actually made the law. This has been particularly the caſe with reſpect to moſt of the doctrines which have been advanced concerning libels; and the law which has been made by them upon this ſubject has been highly injurious to the rights of the people, and totally inconſiſtent with national freedom. Theſe doctrines were not, indeed, invented by the judges; they were derived from the court of Star-chamber; but it is the adoption of them by ſome of the judges, which has alone given to theſe doctrines the venerable denomination of the law of England. To their authority too implicit an acquieſcence has been given. The judges are very high and reſpect-

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able magiſtrates, appointed to aſſiſt in the adminiſtration of the laws; but it was never intended by the conſtitution that they ſhould be legiſlators. The latter character has, however, been too much aſſumed by them; and to this aſſumed power a ſubmiſſion has been paid, to which it undoubtedly never had a conſtitutional claim.

If the Star-chamber doctrines concerning libels be the law of England, they are an extreme diſgrace to this country, and ought to be immediately aboliſhed by expreſs ſtatute. But they never received the ſanction of the legiſlature, they are adverſe to every principle of our free conſtitution, and can derive no authority from the infamous court to which they owe their origin. Nor ought any maxims to be received as law in this country, which have not a better ſource, and which are not more congenial to the general ſpirit of our conſtitution.

MANY hardſhips and oppreſſions which have been ſuffered, by thoſe perſons who have undergone proſecutions for libels, and ſome of whom have been men of as much integrity as any this country has produced, have been the reſult of the groſs partiality of the judges in crown cauſes. It may alſo be obſerved, that the ſentences for libels in the court of Star-chamber were extremely rigorous and cruel; and after the abolition of that court, the Star-chamber ſentences, as well as the Star-chamber doctrines, were too cloſely copied by the courts of law. In the worſt times, groſs injuſtice has been committed by the judges in ſuch caſes; and theſe inſtances are urged as *precedents**, in better and more mederate times.

IN

* The *precedents* of ſentences, in trials for libels, naturally bring to remembrance the remarks of Swift. 'It 'is a maxim,' ſays he, 'among theſe lawyers, that whatever hath been done before, may legally be done again: 'and, therefore, they take ſpecial care to record all the 'deciſions formerly made againſt common juſtice, and the 'general

In the reign of queen Anne, the celebrated Daniel Defoe, for writing a pamphlet, entitled, "The ſhorteſt way with the "Diſſenters," was ſentenced to ſtand three times in the pillory, to pay a fine of 200 marks, and to find ſecurity for his good behaviour for ſeven years. Salmon obſerves, that 'the deſign of this book was to 'inſinuate that the parliament were about 'to enact ſanguinary laws, to compel the 'Diſſenters to conformity[62].' It was an ironical attack upon the high-church party.

In 1717, Mr. Redmayne, a printer, was tried and convicted for publiſhing a libel, written by Mr. Howel, and entitled, "The "Caſe of Schiſm in the Church of England "truly ſtated." He was ſentenced to pay a fine of five hundred pounds, to remain a

'general reaſon of mankind. Theſe, under the name of 'precedents, they produce as authorities to juſtify the moſt 'iniquitous opinions, and the judges never fail of direct-'ing accordingly' *Voyage to the Houyhnhnms*, ch. v.

[62] Chronological Hiſtorian, p. 257.

priſoner

priſoner five years, and to find ſureties for his good behaviour during life[63].

In very late times, the judgments pronounced againſt libellers, or thoſe who have been deemed to be ſuch, have been, to ſay the leaſt, ſufficiently ſevere: and they were ſometimes more ſevere in reality, than in appearance. They were attended with great expences, and the mode of proſecution has been peculiarly burthenſome and oppreſſive. It will hardly be thought, by any impartial man, that ſentences for libels, even in the preſent reign, have been too much characterized by gentleneſs and mildneſs. In 1777, Mr. John Horne, now Mr. Horne Tooke, was tried in the court of King's Bench at Guildhall, for two libels, on an information filed againſt him by the attorney-general. Theſe libels were advertiſements publiſhed in the news-

[63] Chronological Hiſtorian, p. 375.

papers,

papers, in which it was ſtated, that a ſubſcription was entered into by ſome members of the "Conſtitutional Society," for raiſing one hundred pounds for the widows, orphans, and aged parents of thoſe Americans who had been "inhumanly "murdered by the king's troops at Lexing-"ton." Mr. Horne defended himſelf with uncommon ſpirit, acuteneſs, and ability. The jury, however, thought proper to bring him in guilty; and he was ſentenced to pay a fine of 200 l. to be impriſoned for twelve months, and to find ſureties for his good behaviour for three years, himſelf in 400 l. and two ſureties in 200 l. each[64]. The advertiſements had been publiſhed more than two years before Mr. Horne was brought to trial. Several printers had been before tried, and convicted, for the publication of the ſame advertiſements.

[64] State Trials, vol. XI. p. 294. Hargrave's edition.

THE manifeſt deſign of the advertiſements publiſhed by Mr. Horne, was, to impreſs upon men's minds a conviction of the wickedneſs of that war, which we had then unhappily commenced againſt the Americans. Of the complicated iniquity and folly of that war, it is probable that few men now entertain a doubt: and if the nation, at its commencement, could have been excited, by publications from the preſs, to have put an immediate end to it, the conſequences to Great Britain would have been beneficial in a very high degree; it would nave prevented an immenſe expence of blood and treaſure; and would have preſerved the nation from many of thoſe taxes, and other burdens, which are now found ſo grievous and ſo oppreſſive.

IN Mr. Horne's defence of himſelf, in which to obtain an acquittal ſeemed evidently not to be his chief object, he very clearly and ably pointed out to the jury the

the unconſtitutional powers that were exerciſed by the attorney-general in filing informations *ex officio* for libels; the hardſhips that attended this mode of proſecution; and the diſadvantages that attended the defendant in ſuch a cauſe, from the mode that was adopted, in London and Middleſex, of forming ſpecial juries, who are generally preferred to common juries, by the crown officers, for trying ſuch cauſes. As to the power aſſumed by the attorney-general, of filing informations for libels at his pleaſure, it is certainly a power inconſiſtent with the principles of a free conſtitution: and it is reported to have been long ago ſaid by ſir Matthew Hale of this ſpecies of information, that "if ever they came into "diſpute, they could not ſtand, but muſt "neceſſarily fall to the ground [65]." To prevent all future diſputes upon the ſubject,

[65] Letter concerning Libels, Warrants, the Seizure of Papers, &c. p. 7.

an act for the abolition of this power, claimed by the attorney-general, would be in every reſpect ſtrictly proper; it would be a popular act, and would do honour to a Britiſh parliament; nor could ſuch an act be diſcountenanced by any miniſter, who was a friend to the rights of the people, or who could have any juſt claim to their confidence.

In the caſe of the King againſt Almon, that bookſeller was proſecuted by the attorney-general, and convicted of publiſhing a libel, in a miſcellaneous collection, called "The London Muſeum," though it was ſold at his ſhop by his ſervant, without his knowledge or approbation. Before judgment was given, ſeveral affidavits were admitted in the court of King's Bench, by which it was proved, that the libels were ſent to his ſhop without his knowledge; and that, when he was acquainted with their being

being in his houſe, he immediately ſtopt the ſale of them. Notwithſtanding theſe favourable circumſtances, he received ſentence, in the court of King's Bench, to pay a fine of ten marks, and to be bound himſelf in a recognizance of 400 l. for his good behaviour for two years, and to find two ſureties in 200 l. each, under pain of impriſonment[66]. His expences alſo amounted to more than 200 l.

Among other privileges claimed by the attorney-general, in trials for libels, one is, that of not only enforcing the charge againſt the defendant at the opening of the cauſe, but alſo of replying, after the perſon accuſed has made his defence. On the trial of Mr. Horne, this claim was oppoſed by that gentleman with great ſpirit; but he was over-ruled, and the claim of the attorney-general was admitted, and de-

[66] Vide Second Poſtſcript to the Letter to Mr. Almon, p. 30—38.

clared

clared to be law. When it has been aſked, how this practice came to be law, no ſatisfactory anſwer has been returned. But the fact ſeems to be, that, from the partiality with which judges have frequently acted in crown cauſes, the perſons holding the office of attorney-general have been ſeveral times permitted to reply; theſe inſtances are exalted into precedents; and we are at length informed, that the practice is law. But if it be law, it is ſurely not equal juſtice. If the proſecutor be allowed to ſpeak twice, the defendant ought to have the ſame liberty. The contrary practice can only be a ſervile com pliment to the crown, to the prejudice of the ſubject, and in oppoſition to the dictates of reaſon and of juſtice. If the attorney-general is to ſpeak firſt, and to ſpeak laſt, and if the judge, which is no very improbable thing ſhould alſo have a ſtrong diſpoſition to convict the defendant, and ſhould adapt his ſpeech to the jury accordingly, the unfortunate

tunate libeller, or pretended libeller, would have very little chance of obtaining an acquittal. If he had not the good fortune to have a ſpirited and enlightened jury, he might be condemned, and ſuffer heavy penalties, though his publication might not deſerve the cenſure of his countrymen, but be entitled to their approbation and applauſe.

THE proceedings in trials for public libels, and the ſentences which are paſſed upon conviction, are attended with various circumſtances, that ſeem ſtudiouſly intended to render ſuch proſecutions peculiarly grievous and oppreſſive. Among other appendages to the ſentences upon libellers, one commonly is, obliging the perſon convicted to give ſecurity for his future good behaviour. The reaſon of this ſeems not very apparent. It has been obſerved, that 'ſecurity for the peace is calculated as a 'guard from perſonal injury; and articles 'of the peace can only be demanded from

'a man

'a man, who by ſome poſitive act has al-'ready broken the peace, and therefore is 'likely to do ſo again; or where any one 'will make poſitive oath, that he appre-'hends bodily hurt, or that he goes in 'danger of his life[67].' But a perſon who has written a libel, or pretended libel, is not on that account ſuppoſed to be a man who would bruiſe, or maim, or knock down his neighbours. Security for the peace, therefore, ſeems no neceſſary part of the puniſhment of a libeller. If he ſhould write another libel, and be again convicted, he will of courſe be again puniſhed, and there can be no doubt but that the penalties will be amply ſufficient. In truth, as there is no reaſon for requiring ſureties of the peace from a ſuppoſed libeller previouſly to his conviction, neither does there appear any juſt ground for annexing ſureties for the behaviour to the ſentence of a libeller.

[67] Letter concerning Libels, p. 18.

But

But it conſiderably increaſes the difficulties of the libeller, and eſpecially if he be a man of a high and unconquerable ſpirit: and ſuch men, if they engage in ſupport of the rights of the people, are always objects of great averſion to crown lawyers and prerogative judges.

JURIES have been ſometimes ſo much puzzled by the directions from the bench, and the contrary pleadings of the counſel, in trials for libels, that they have ſeveral times given irregular and incomplete verdicts. Inſtead of bringing in a general verdict of *guilty*, or *not guilty*, they have brought in the party accuſed *guilty of the particular fact charged*, ſpecifying the fact in their verdict. It is obſerved by ſir John Hawles, that "ſuch a finding hath gene-" rally been refuſed by the court, as be-" ing no verdict;" though, he adds, it had been received, "in a caſe that required

" favour."

"favour [68]." That is, not a caſe in which the party tried was to be favoured, but in which the proſecution was to be favoured; and in which it was thought a deſirable thing to obtain a verdict of *guilty*, at any rate, and in any manner.

In the caſe of the King againſt Williams, the jury, inſtead of bringing in a general verdict of *guilty*, or *not guilty*, brought the defendant in guilty of printing the particular paper with the publication of which he was charged. Their verdict was, "Guilty "of printing and publiſhing the North "Briton, No. 45." The Writer of theſe *Obſervations* was preſent in court during that trial; and he remembers, that it then appeared evident to him, that the jury, by the manner of bringing in their verdict, meant to find the mere facts of printing and publiſhing, without determining whether

[68] Engliſhman's Right, p. 19, 20.

the

the paper was, or was not a libel. It alſo appeared, to him, to be a verdict that the jury ought not to have given, and that the judge ought not to have taken. He did not, however, know, till he was informed by the publication of the "opinion of the "court of King's Bench, in the caſe of the "King againſt Woodfall," that the clerk had taken upon him to alter the verdict. But we now know, from the moſt unqueſtionable authority, that the clerk altered the verdict, and entered it up as a general verdict of *guilty*[69]. But whatever irregularity there might be in the verdict, or whatever injuſtice in the alteration of it by the clerk, it is certain, that the bookſeller ſtood in the pillory, and ſuffered other penalties, in conſequence of that verdict. The writer alſo well remembers, that, at the trial of Mr. Williams, he was much ſtruck at the ſtrong reſemblance which there was, both in point of ſentiment and language,

[69] Sir James Burrow's Reports, vol. V. p. 2668.

between

between the charge delivered on that occaſion, and ſome parts of the charge delivered in the caſe of Sir Samuel Bernardiſton.

The irregular verdict, in the caſe of the King againſt Williams, was urged by the court, in the caſe of the King againſt Woodfall, as a juſtification for taking a verdict of ſimilar irregularity in the latter caſe. This ſhews the neceſſity of guarding againſt incroachments, and ſuch dangerous innovations, as are likely to be prejudicial to the liberty of the ſubject; as ſuch encroachments and innovations are afterwards produced as precedents. It ſhould, however, be obſerved, that the ſame judge tried both theſe cauſes; and the ſame judge, on a motion for arreſt of judgment in Woodfall's caſe, delivered the opinion of the court.

THE opinion of the court, in the caſe of the King againſt Woodfall, was drawn up with great legal ſubtilty. It had not the perſpicuity, which lord Camden has ſometimes diſplayed, on giving important deciſions; nor was it intended for common readers, or for common auditors. It was calculated only for the initiated. The dexterity of it was, however, ſufficiently manifeſt to all thoſe who were capable of underſtanding it. It is well known, that the doctrines concerning juries, which are conveyed in this opinion, have been publickly queſtioned by lord Camden.

No jury ought to find any man guilty of writing, printing, or publiſhing a libel, unleſs they are convinced it is a criminal production. If the criminality be not apparent to them, or if they are doubtful, they ought to acquit the defendant. In that caſe, the information or indictment has not been proved to them; and where the matter

matter is doubtful, in criminal proſecutions, an acquittal is always moſt conſonant to the ſpirit of the law of England. In many caſes, when a jury bring in a verdict of *Not guilty*, the meaning is not, that they are aſſured that the accuſed party is innocent, but that his guilt has not been proved to them: and this is always ſufficient ground for an acquittal. Nor ſhould incomplete verdicts ever be given in ſuch caſes; or any judgments be pronounced in conſequence of ſuch verdicts. In the caſe of the King againſt Simons, upon a rule to ſhew cauſe why a new trial ſhould not be had, it was ſaid by Mr. Juſtice Deniſon, that 'if the 'verdict had been taken as the jurors in-'tended to give it; namely, guilty of the 'fact, but without any evil intention, it 'would have been an incomplete verdict, 'and conſequently, no judgment could 'have been given upon it[70].' And in ſundry caſes, it has been held by law writers,

[70] Sayer's Reports, p. 36.

to

to be extremely improper in juries to bring in ſpecial verdicts. Thus it is ſaid in Jenkins's Reports, that 'where fraud, covin, 'or other doubtful matter of fact occurs to 'the jurors, they ought not to make a ſpe-'cial verdict of it, but give a poſitive and 'categorical verdict[71].'

It appears, that attempts have been made to eſtabliſh the Star-chamber doctrines concerning libels even in America, and to deprive jurymen there, as well as in England, of the right of determining the law, as well as the fact, in trials for libels. Thus in the caſe of John Peter Zenger, who was tried at New York, in 1735, for printing and publiſhing two libels againſt the government, it was contended, by the attorney-general of that province, that, as the defendant's counſel admitted the publication of the papers, ſtated in the information to be libels, the jury muſt find

[71] Second edition, p. 232.

a ver-

a verdict for the king: "for," ſaid he, "ſuppoſing they were true, the law ſays, "that they are not the leſs libellous for "that; nay, indeed, the law ſays, their "being true is an aggravation of the "crime[72]." The chief-juſtice of New York alſo maintained ſimilar doctrines; and told the jury, in his charge, that whether the papers were libels was a matter of law, which they *might* leave to the court. The pretended libels were news-papers, containing paſſages, in which the conduct of the governor of New York was arraigned. The printer was defended with great ſpirit and ability by ANDREW HAMILTON, Eſq; of Philadelphia, who went from that city to New York, on purpoſe to act as counſel in this cauſe. Mr. Hamilton firmly maintained, that the jury had a right "to deter-"mine both the law and the fact." The jury aſſerted that right; and accordingly,

[72] Trial of John Peter Zenger, p. 28. edit. 8vo. 1752.

though

though the defendant's counſel admitted the facts of printing and publiſhing, they found the printer *Not guilty*. Mr. Hamilton refuſed to accept of any fee for his ſervices on this occaſion; but the mayor, and corporation of New York, preſented him with the freedom of that city in a gold box, for "his generous defence of the "rights of mankind, and the liberty of "the preſs, in the caſe of John Peter "Zenger."

As the inhabitants of the United States of America, in conſequence of having obtained their independence, have a power of making their own laws, it may be hoped, that they will be too wiſe to adopt the whole ſyſtem of our law of libels in their new government; and that they will preſerve unviolated, and in their full extent, the rights of juries. There are many particulars in the law of England, and in the proceedings of our courts, ſo truly excel-

lent, as to be highly worthy of their adoption; but there are other particulars, in the law and in the practice of the courts, ſo extremely burthenſome and expenſive, and of ſo little advantage to any but the practitioners of the law, that the Americans will act wiſely in adopting different maxims of law, and different modes of practice. Indeed, the uncertainty of the law, in a variety of inſtances, and its enormous expence, are objects highly worthy the attention of the parliament of England. In many caſes, the expence attending lawſuits is ſo great, that it is better to ſubmit to injuſtice than to appeal to the law; which is an evil that certainly ought not to ſubſiſt in a well-regulated ſtate. Among other things, it may alſo poſſibly be doubted, whether the practice is a beneficial one, of readily and frequently granting new trials, becauſe a judge happens not to like a verdict, or becauſe it was given contrary to his direction, though perhaps ſtrictly conformable

formable both to law and equity. This practice contributes much to increaſe the uncertainty of the law; though it muſt be acknowledged to be advantageous to its practitioners, however inconvenient it may be to the public in general.

NOTWITHSTANDING the attempts which have been made by ſome judges, and crown lawyers, to deprive juries of thoſe powers which have been given them by the conſtitution, there have always been ſome lawyers, and ſuch as have been diſtinguiſhed for their integrity, and the extent of their legal knowledge, who have aſſerted the rights of juries, and particularly in the caſe of libels. Among others, Lord CAMDEN is underſtood always to have maintained the right of juries to determine both the law and the fact. Even when attorney-general, Mr. Pratt, now Lord Camden, in moving, before lord Mansfield, for leave to file an information againſt Dr. Shebbeare for

a libel, publickly ſaid, and was not contradicted: 'It is merely to put the matter in 'a way of trial; for I admit, and *his lord-* '*ſhip well knows*, that the jury are judges 'of the law as well as the fact, and have 'an undoubted right to conſider, whether, 'upon the whole, the pamphlet in queſtion 'be or be not publiſhed with a *wicked*, *ſe-* '*ditious intent*, and be or not a *falſe*, *ma-* '*licious*, and *ſcandalous* libel [73].'

As the late caſe of the Dean of St. Aſaph has particularly excited the attention of the public to the law of libels, and to the rights and power of juries in ſuch caſes, it may not be improper here to make ſome farther obſervations relative to that cauſe. The Dialogue, for the publication of which the Dean was proſecuted, was originally printed, and diſtributed gratis, at the expence of the "Society for Conſtitutional

[73] Second Poſtſcript to the Letter to Mr. Almon, 8vo, 1770, p. 7.

"Inform-

"Information[74]. After a bill of indictment had been found againſt the Dean of St. Aſaph, for the publication of that edition of it which was printed in Wales, Sir WILLIAM JONES, who was then in England, and who was a member of the ſociety by which it was originally publiſhed, ſent a letter to Lloyd Kenyon, Eſq; then chief-juſtice of Cheſter, and now maſter of the rolls, in which he avowed himſelf to be the author of the Dialogue, and maintained, that every poſition in it was ſtrictly conformable to the laws and conſtitution of England. The trial of the Dean, however, came on at Wrexham, on the 1ſt of September, 1783; and a ſpecial jury was empannelled to try the cauſe, conſiſting of ſome of the moſt reſpectable gentlemen in Wales. But before they were ſworn, an affidavit was offered, and received by the court, in which it was ſtated, that papers

[74] This is a different ſociety from that mentioned p. 97.

had

had been diſperſed at Wrexham, which were calculated to prejudice the minds of the jury in this cauſe. Theſe papers conſiſted of ſeveral extracts from the ſixth volume of *Britiſh Biography*, octavo, containing certain paſſages, aſſerting the right of juries to determine the law, as well as the fact, in trials for libels. That volume of this biographical work, from which theſe extracts were made, was printed in 1770, thirteen years before the trial of the Dean of St. Aſaph; and no addition was made to theſe extracts, but a vote of the "Society for Conſtitutional Information," for their publication, in which no mention was made of the trial of the dean of St. Aſaph. However, in conſequence of the diſperſion of theſe papers, an immediate ſtop was put to the trial, and it was ordered to ſtand over to the next grand ſeſſion for the county of Denbigh. But whether it was in any reſpect juſt, or reaſonable, or proper, thus to ſuſpend the trial, at a great expence

expence to the defendant, merely becauſe papers had been diſperſed in the neighbourhood, aſſerting the general rights of juries, but in which not a ſingle ſyllable was advanced, relative to the particular cauſe of the dean of St. Aſaph, muſt be left to the deciſion of the impartial public, who will probably think and ſpeak as freely of judges, or of maſters of the rolls, as they do of kings and miniſters of ſtate.

At the great ſeſſion held at Wrexham, in the September following the cauſe of the dean of St. Aſaph was to have come on again; but a writ of *certiorari* was then obtained, by which the indictment was removed into the court of King's Bench, and the cauſe was ordered to be tried at the next aſſizes at Shrewſbury. It was accordingly brought on before Mr. Juſtice Buller, and tried by a ſpecial jury, on the 6th of Auguſt, 1784. Mr. Erskine, who was counſel for the dean of St. Aſaph, defended the

cauſe

cauſe of his client with much ſpirit and eloquence; and, in a very manly manner, avowed his own perſonal conviction, that the doctrines contained in the dialogue were juſt and conſtitutional. He alſo aſſerted the right of the jury to determine whether the dialogue was a libel, as well as to inquire into the fact of publication. But the jury were inſtructed by the judge, that whether the pamphlet was, or was not a libel, was a queſtion of law, to the determination of which they were not competent. It was alſo ſomewhat ſingular, that the learned judge himſelf, before whom the cauſe was tried, did not chooſe to give any opinion whether the dialogue was, or was not a libel. It was not for him, he ſaid, a ſingle judge, ſitting at *Niſi prius*, to ſay whether the pamphlet was, or was not a libel.

One reaſon aſſigned for declining to give any opinion whether the Dialogue was, or was not a libel, was, that, if this were

were done, the proſecutor would thereby be deprived of that valuable birth-right, a writ of error. This ſentiment had at leaſt the merit of novelty, as it does not appear that ſuch a ſentiment was ever before advanced in ſuch a caſe. Another reaſon was, that it was not yet the proper *ſtage of the buſineſs*, to determine whether the pamphlet was, or was not a libel. This alſo ſeems an idea perfectly original. It was formerly thought, that when a man was brought to be tried before a judge and jury, it was their buſineſs to acquit or to condemn him. But now, it ſeems, if he be a libeller, he is to go through ſeveral ſtages. A robber, or a murderer, may, unleſs the jury bring in a ſpecial verdict, which is very ſeldom done, be either acquitted or condemned at once: but a libeller is to go through a variety of *ſtages*, to the great entertainment of himſelf and the public, and very much to the comfort

and

and emolument of the gentlemen of the law.

THE cauſe of the dean of St. Aſaph was firſt brought on at Wrexham. It was then put off, becauſe papers had been diſtributed in the neighbourhood relative to the rights of juries. It was brought on again at Wrexham, but was removed by writ of *certiorari* from the court of King's Bench, by which the cauſe was to be brought to trial in an Engliſh county. It was then tried by a ſpecial jury at Shrewſbury. But it was not yet to be finally determined. It had not gone through the neceſſary ſtages. Beſides the proſpect of the judgment which might be paſſed, the dean might have the additional felicity of an application to the court of King's Bench, and an appeal to the Houſe of Peers. If all this did not ſatisfy him, he muſt be a man eminently unreaſonable; and if he were not ſatisfied, it is at leaſt probable that the lawyers would.

THE

THE dean of St. Aſaph, being a man of fortune, might indulge himſelf in this luxury of law: but to a libeller, or one who might be termed ſuch, whoſe circumſtances were leſs affluent, it would not be quite ſo pleaſant or convenient. Such a man might wiſh to meet with a jury, who ſhould have ſufficient ſpirit and diſcernment to do juſtice to their fellow-citizen themſelves, as was originally intended by the very inſtitution of juries, and not leave him to ſeek it, either from the judges of the court of King's Bench, or from the Houſe of Peers.

THE cauſe of the dean of St. Aſaph is now over; but though ſeveral hundred pounds have been expended on the part of that gentleman, it has not yet been determined, by the courts of law, whether the pamphlet, which he was proſecuted for publiſhing, was, or was not a libel. It has, however, been probably decided, by the

the moſt enlightened part of the nation, that it was a production which contained no ſentiments, but what were perfectly conſonant to the genius of the Engliſh conſtitution. It was a ſpeculative pamphlet on the general principles of government, and on the right of the people to bear arms, and to qualify themſelves for the uſe of them. As to the right of the people to bear arms, this is a right which the inhabitants of this country will hardly ſuffer to be wreſted from them. Should they ever be thus tame and ſervile, the purpoſes for which the Revolution was effected will be defeated, and the Engliſh nation will no longer have any claim to be conſidered as a free people.

Sir William Jones, the author of the dialogue for the publication of which the dean of St. Aſaph has been proſecuted, is now one of the judges of his majeſty's ſupreme court of judicature in Bengal. It

was

was ſaid of this gentleman, by the judge before whom the cauſe came on at Wrexham, in 1783: 'It is very true, as has 'been ſtated by Mr. Erſkine, that he is 'gone in a judicial capacity into a country, 'where it would be unwiſe to ſend a man 'in that character who has any thing ſedi-'tious about him. Whether it will be pro-'per to *review* that appointment, or not, 'is not for me to ſay: it is certainly a thing 'fit to be conſidered, and ſeriouſly and ſo-'berly to be conſidered, by thoſe to whom 'it belongs to conſider it.' I confeſs, that I perfectly agree with this learned judge, that the appointment of men to judicial offices, in any part of the Britiſh dominions, is a matter that deſerves to be conſidered, and very *ſeriouſly and ſoberly conſidered*, by thoſe who are admitted into his majeſty's councils. If men are raiſed to the office of judges, who are known to be poſſeſſed of arbitrary and unconſtitutional principles, this is a juſt ground of alarm to the nation: and

if

if men, who have diſtinguiſhed themſelves by judicial deciſions that are repugnant to the principles of a free and limited government, are preferred to ſtill higher offices, this muſt afford abundant reaſon for the people to entertain ſuſpicion and diſtruſt of any adminiſtration by which ſuch appointments are made. There can, however, be no occaſion for reviewing, or re-conſidering, the promotion of ſir WILLIAM JONES. His appointment did honour to the adminiſtration by which it was made. If this country has any right to ſend judges to the Eaſt Indies, no man could be more proper for that office, than a gentleman diſtinguiſhed not only by his ſkill in the laws of England, but by a very extenſive acquaintance with oriental languages, and oriental literature, and alſo poſſeſſed of an enlarged and liberal mind, and a ſincere attachment to the intereſts of juſtice and humanity.

ONE of the moſt memorable caſes, in which Engliſh juries have aſſerted their right of judging of the law, as well as the fact, in trials for libels, is that of Mr. WILLIAM OWEN, who was tried in the court of King's Bench, by a ſpecial jury, in 1752, on an information filed by the attorney-general, for publiſhing a pamphlet, entitled, "The caſe of the Hon. ALEX. MURRAY, "Eſq; in an appeal to the people of Great "Britain." This pamphlet contained a narrative of the rigorous treatment which Mr. Murray had received from the Houſe of Commons, in conſequence of ſome charges exhibited againſt him reſpecting his behaviour at the Weſtminſter election, in 1750, and on account of his having refuſed to receive the ſentence of the houſe upon his knees. In this publication were alſo ſome ſevere ſtrictures on the conduct of the houſe in this buſineſs. Of the charge againſt Mr. Murray, who was brother to lord Elibank, it is obſerved by lord Melcombe

combe Regis, who was preſent in the houſe at the time, that he " never ſaw an accuſa- " tion worſe ſupported by any thing but " numbers [75].' Indeed, the treatment which Mr. Murray received was violent, arbitrary, and oppreſſive, and ſuch as will ever reflect extreme diſgrace on that parliament. The pamphlet, therefore, containing an account of his caſe, was naturally a ſevere attack upon the Houſe of Commons; but though it was ſevere, it was juſt. For the conduct of the houſe in this affair was more ſuitable to the character of a court of inquiſition, than to that of a Britiſh Houſe of Commons. After the publication of the pamphlet, the houſe voted it to be " an im- " pudent, malicious, ſcandalous, and ſeditious libel:" and preſented an addreſs to the king, requeſting his majeſty to order his attorney-general to proſecute the author, printer, and publiſher. Mr. Murray

[75] Diary, p. 88.

having

having now quitted the kingdom, the proſecution fell upon the bookſeller. The trial came on at Guildhall, before ſir William Lee, lord-chief-juſtice of the court of King's Bench. Mr. Murray, now lord Mansfield, as ſolicitor-general, was one of the counſel for the crown againſt Owen; and Mr. Pratt, now lord Camden, was one of the counſel for the bookſeller. Mr. Murray contended, that the queſtion was, 'Whether the jury were ſatisfied, that the 'defendant, Owen, had publiſhed the 'pamphlet? If the fact was proved,' he ſaid, 'the libel *proved itſelf*, the *ſedition, diſ-* 'turbance, &c.[76]:'

Mr. Ford, one of the counſel for the defendant, maintained, on the contrary, that proving the publication, was not proving the charge ſtated in the information. 'Only 'proving the ſale of the book,' ſaid he, 'does not prove all thoſe opprobrious and

[76] State Trials, vol. X. p. 205.

'hard terms laid in the charge againſt the 'defendant.' He added, 'I muſt obſerve 'one thing, which is, the danger of your 'finding a verdict *ſpecially*. Suppoſe you 'find him *Guilty of publiſhing* and ſelling 'this book. *Guilty* includes *guilt:* then 'guilty of what? Selling paper. Where is 'the guilt? Take care, gentlemen, of be-'ing *deceived*, by finding him *guilty* any 'way. By bringing in your verdict any 'way againſt him, you render him liable 'to *the conſequences of the whole*; that is, 'to the ſame penalties that he would have 'been liable to, if he had committed the '*whole crime* laid to his charge, and that 'charge *fully proved* againſt him!—— By 'finding him *guilty*, you do all that you 'can againſt him; and then it will be out 'of your power to ſerve him[77].' And Mr. Pratt alſo contended, that if that part of the information againſt the defendant was not proved, that he had publiſhed the book *ma-*

[77] State Trials, vol. X. p. 207.

liciouſly,

liciouſly, *ſeditiouſly*, *ſcandalouſly*, &c. that the jury ought to acquit him.

THE fact of publication was clearly and circumſtantially proved; and the chief-juſtice, in his charge, gave it as his opinion, 'that the jury *ought* to find the defendant '*guilty*; for he thought the fact of publica-'tion was fully proved; and, if ſo, they '*could not avoid* bringing in the defendant 'guilty[78].' The jury, however, thought otherwiſe; and nobly reſolved to aſſert their right of judging of the law, as well as of the fact. The pamphlet ſtyled a libel contained a real ſtate of facts, and was ſuch an appeal to the public as an injured and oppreſſed man had a right to make. They, therefore, notwithſtanding the opinion of the chief-juſtice, and the vote of the Houſe of Commons, and though the fact of publication was fully proved, brought in the bookſeller *Not guilty*. At the deſire of the at-

[78] State Trials, vol. X. p. 208.

torney-general, the chief juſtice aſked the foreman of the jury, " Whether they " thought the evidence laid before them, of " Owen's publiſhing the book by ſelling it, " was not ſufficient to convince them, that " the ſaid Owen did ſell that book." The foreman, without anſwering the queſtion, ſaid *Not guilty*, *Not guilty*; and ſeveral of the other jurymen ſaid, " That is our ver- " dict, my lord, and we abide by it [79]." The attorney-general deſired the chief-juſtice to put ſome other queſtions to the jury; but this his lordſhip thought proper to decline. Thus did reaſon, juſtice, and common ſenſe, obtain a clear and decided victory over the efforts of abuſed power, and the arts of legal ſophiſtry: and, in every ſimilar caſe, the conduct of Owen's jury is a proper model for future juries.

As the greateſt part of what is now called the law of libels has been made or

[79] State Trials, vol. X. p. 208.

intro-

introduced by the judges; ſo they have declared themſelves to be the ſole interpreters of it; and they are alſo to inflict puniſhments for the breach of it at their diſcretion. No pretended independence of the judges can be a ſufficient ſecurity to the ſubject in ſuch a ſtate of things. No conſtitutional queſtion of more conſequence has been agitated ſince the Revolution, than that of the right of juries to determine the law, as well as the fact, in criminal proſecutions. It has been juſtly obſerved by Mr. Erſkine, that the nation in general are not ſufficiently aware of the importance of this great queſtion. That freedom of the preſs, to which this country owes much of its reputation among foreign nations, muſt be for ever abandoned, it will be eventually given up, if the Star-chamber doctrines concerning libels are ſuffered to prevail, and if juries, in trials for libels, are confined to the mere fact of publication, and deprived of the right of determining

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the innocence, or criminality, of thoſe books or papers which may be denominated libels.

THE queſtion has never yet been put to twelve judges, reſpecting the power of juries in trials for libels; and ſhould it ever be put to them, I cannot believe that they would determine, that juries are confined to the mere fact of publication, and to filling up the blanks. But ſhould they ever come to ſuch a determination, if there be a caſe, in which even the opinion of the judges collectively is not implicitly to be ſubmitted to, this is that caſe. It is a caſe in which they are parties, the point in conteſt being the extent of their own juriſdiction. They cannot be properly poſſeſſed of the power that is claimed, unleſs it can be proved to be a part of the ancient common law of the land, or unleſs it has been granted to them by the legiſlature. The former cannot be proved; and as to the latter,

latter, there are not the leaſt traces of its having been granted to them, at any period, by the legiſlature; nor will it ever be conferred upon them by any legiſlature, that has any juſt regard to the rights of the ſubject, or to the freedom of the preſs.

If twelve men, aſſiſted by the opinion of the judge, and the pleadings of the counſel, cannot find out that a book, or paper, the writer, printer, or publiſher of which they are appointed to try, really contains any thing criminal; if they do not find that it is entitled to the deſcription given of it in the information or indictment; they ought, in every ſuch caſe, to acquit the defendant. No book can be publickly pernicious which a jury cannot comprehend, and of which they cannot diſcern the criminality. If it be ſo dark and myſterious, that a jury cannot underſtand it, it can be productive of little miſchief.

chief *. If the judge does not chooſe to give any opinion upon the ſubject, it is, notwithſtanding, the duty of the jury to determine for themſelves, and to find that man *Not guilty*, of whoſe criminality they are not convinced. And if the judge does venture to give his opinion, and to pronounce of any book or paper that it is libellous, the jury have ſtill a right to determine for themſelves, and to acquit the defendant, if no evidence has been produced that is ſatisfactory to their own minds, that the defendant has been guilty of ſome criminal action, or of a breach of ſome known and poſitive law. As to the mere facts of writing, printing, or publiſhing, theſe are actions as perfectly innocent and indifferent as riding or walking; and if nothing elſe be proved to a jury, it is extremely unjuſt,

* Even ſerjeant Hawkins ſays, 'It is a ridiculous abſurdity to ſay, that a writing, which is underſtood by every the meaneſt capacity, cannot poſſibly be underſtood by a judge and jury.' *Pleas of the Crown*, p. 194.

and

and abſurd, in them, to pronounce a fellow-citizen *Guilty*, in any form of words whatever. It is certainly contrary to the dictates of reaſon and juſtice, that it ſhould be taken for granted by a jury, that any book or paper is a libel, without ſome ſatisfactory evidence to them that it is ſo. *Nullum iniquum in jure præſumendum eſt*, is an ancient maxim of the law of England. No injurious thing is to be preſumed in the law. Nor ſhould any jury find any man guilty of having publiſhed a libel, till they are not only convinced of the fact of publication, but alſo of the criminality of the production.

A JURY has an undoubted right to bring in a general verdict, nor can they be compelled to explain upon what grounds their verdict is founded. If, therefore, they are apprehenſive of being entrapped by the court, or of affording ſome pretence for a new trial, and if they are convinced in

their

their own minds, that the perſon accuſed has not publiſhed any thing really criminal, they have a right to bring in a general verdict of *Not guilty*. And by ſuch a verdict, they do not neceſſarily find upon their oaths, as ſome have ſuppoſed, that the party accuſed has not written, printed, or publiſhed ſuch a book or paper, but that he is not guilty of the crime laid in the information or indictment; that he has not written, printed, or publiſhed, a falſe, ſcandalous, and ſeditious libel; or that whatever he has written, printed, or publiſhed, has not been done maliciouſly, or with an evil or wicked deſign. In ſhort, that he is not guilty, *in manner and form*, as laid in the information or indictment.

It ſeems reaſonable that juries, in trials for libels, ſhould inſiſt on reading themſelves, and deliberately, the information, or indictment, as was done in the caſe of the ſeven biſhops. In that caſe, they had the

the copy of the information, as well as the pretended libel, out with them for that purpoſe. A jury ſhould carefully examine, whether all the ſubſtantial parts of the charge againſt the defendant have been proved to them; and if not, they ought to acquit him. It is their duty to inquire for themſelves; they are ſworn *well and truly to try* the cauſe on which iſſue is joined; and they ought not to bring in their verdict from an implicit acquieſcence in the opinion of the judge. 'A man 'cannot ſee,' ſays ſir John Vaughan, 'by 'another's eye, nor hear by another's ear; 'no more can a man conclude, or infer 'the thing to be reſolved, by another's 'underſtanding or reaſoning; and though 'the verdict be right the jury give, yet 'they being not aſſured it is ſo from their 'own underſtanding, are forſworn, at leaſt '*in foro conſcientiæ*[80].'

[80] Vaughan's Reports, p. 198.

ADMIT-

ADMITTING juries to be judges of the law, as well as of the fact, in matter of libel, any man who is charged with writing, printing, or publiſhing, a libel againſt the government, may, if a jury, from a conviction of the criminality of the publication, find him guilty, be puniſhed at the diſcretion of the court. Any private individual, againſt whom any thing libellous has been publiſhed, has a right to bring his action againſt the party offending, and to recover ſuch damages as ſhall be given him by a jury. Theſe reſtraints upon the preſs are ſurely amply ſufficient, and all that ought to be ſubmitted to in a free country. Farther reſtraints would be inconſiſtent with the liberty of the preſs, and highly detrimental to the public.

THERE can be no reaſon for aſſerting, that juries are ſo partial to the liberty of the preſs, that they will wantonly acquit thoſe perſons in whoſe publications there ſhall be evident

evident criminality, or what may appear to them to be ſo. Even in the caſe of Mr. WILKES, popular as that gentleman was, he was found guilty by a jury, both for the North Briton, No. 45, and for the Eſſay on Woman. And in the late caſe of the dean of St. Aſaph, though the jury were avowedly not convinced, that the dialogue, with the publication of which that gentleman was charged, was a libel, they yet declined to bring in a clear verdict of acquittal. There can, therefore, be no reaſon whatever for depriving the ſubject of the protection of a jury, in the caſe of libels, any more than in other caſes; and he is in fact deprived of it, if the jury determine only the point of publication, which is ſeldom a matter of much doubt, and leave the innocence or criminality of what is publiſhed wholly to the determination of the court.

In truth, the great fault of juries has always been, not a propenſity to bring in verdicts, without reaſon, againſt the directions or opinions of the judges; but too much obſequiouſneſs to the court, too great a readineſs to comply implicitly with its directions, and too little firmneſs and ſpirit in aſſerting their own rights. It is alſo a great public evil, that perſons in good circumſtances, and of ſome education, are ſo apt to decline ſerving on juries, eſpecially on what is called the *petit jury*, though they are the moſt likely to diſcharge the duties of the office with propriety and integrity. The *petit jury* is the moſt important jury, that by which matters of life and death, and ſome of the moſt important concerns of men in civil ſociety, are finally determined. The mode of trial by jury would be rendered ſtill more beneficial than it is, if thoſe men who are the fitteſt for the office were more

ready

ready to engage in it. Such men would not be brow-beaten by the court, but would feel the weight that the conſtitution has given them, and would firmly maintain their rights. Men of property, and perſons of education and knowledge, ought not decline ſerving on juries in their turn, unleſs prevented by ſome real impediment. Thoſe men are unworthy of the privileges of Engliſhmen, and of the ſecurity of a free conſtitution, who will not take their part in thoſe public offices that are neceſſary for their ſupport and preſervation.

The right of trial by jury is of infinite importance to the liberty of the ſubject. It cannot be guarded with too much vigilance, nor defended with too much ardour. No part of the power of juries ſhould be given up to the claims, or uſurpations, of any body of men whatever.

The

The rights of jurymen ſhould in all caſes be reſolutely aſſerted, whether they be attacked by open violence, or whether the arts of legal chicane be adopted, in order to render them uſeleſs and nugatory. But if juries ſhould ever be tame and ſenſeleſs enough to give up the right of determining the law, as well as the fact, in libel cauſes, the liberty of the preſs is then wholly at the diſcretion of the judges.

BLACKSTONE ſays of the mode of trial by jury, that it 'was always ſo highly 'eſteemed and valued by the people, that 'no conqueſt, no change of government, 'could ever prevail to aboliſh it; and that 'in *Magna Charta* it is more than once 'inſiſted on as the principal bulwark of 'our liberties [81].' He alſo ſays, that 'it is 'the moſt tranſcendent privilege which

[81] Commentaries, Book III. ch. 23.

any

'any ſubject can enjoy, or wiſh for, that 'he cannot be affected either in his pro-'perty, his liberty, or his perſon, but by 'the unanimous conſent of twelve of his 'neighbours and equals [82].' But if juries are ignorant of their own rights, and timid in the exerciſe of thoſe powers that the conſtitution has given them, the value of this great privilege is exceedingly diminiſhed. There can, however, be no ground for timidity in juries, in the upright diſcharge of the duties of their office: for, ſince the famous determination in Buſhel's caſe, juries are in no danger of being fined or impriſoned, or ſuffering any other penalty in conſequence of their verdicts, however contrary they may be to the direction of the court.

No parliament of this country has ever conferred upon the judges a power of de-

[82] Commentaries, Book III. chap. 23.

termining the matter of law in trials for libels, or the criminality or innocence of publications, independently of a jury. No evidence can be produced, that this is any part of the ancient common law of England. We may, therefore, venture to affirm, that it is not the law of the land; but is a mere aſſumption of ſome of the judges, calculated for the extenſion of their own juriſdiction, to the prejudice of that of juries, to the prejudice of the ſubject, and to the ſubverſion of the freedom of the preſs.

It is manifeſt, that if the Star-chamber doctrines concerning libels are ſuffered to prevail, if juries are reſtrained from entering into the merits of ſuch publications as are termed libels, and if proſecutions for them are frequent, there will be a total end to the freedom of the preſs in this country. Whether the people of England, after the blood and treaſure that have been

expended

expended for the eſtabliſhment of national liberty, will ſuffer themſelves to be deprived of it by the tricks, the arts, and the chicanery of law, is a point to be determined by themſelves. If they ſurrender up the freedom of the preſs, and the rights of juries, either to open violence, or to legal ſubtilty and craft, their other rights will inevitably follow. They will no longer hold their preſent rank among the nations of the world; and muſt bid an eternal farewell to the honour, the dignity, and the felicity of public freedom.

FINIS.